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U.S. LAWS AND REGULATIONS APPLICABLE TO IMPORTS FROM NONMARKET --ETC(U)
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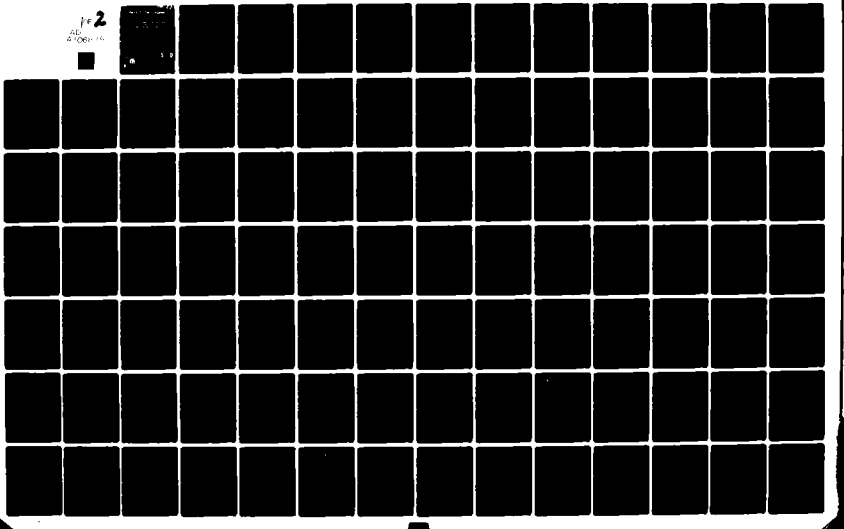


BY THE COMPTROLLER GENERAL

Report To The Congress

OF THE UNITED STATES

U.S. Laws And Regulations Applicable To Imports From Nonmarket Economies Could Be Improved.

For political and economic reasons, the United States trades with countries whose economic systems, unlike ours, are under centralized government control. Because of these differences, U.S. laws designed to protect domestic industry from unfair or disruptive imports are difficult to apply to these nonmarket, principally Communist, countries.

This report discusses how these laws and their implementing regulations could be improved to make them more effective and easier to administer while protecting domestic industries.

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-200452

To the President of the Senate and the
Speaker of the House of Representatives

This report discusses the application of certain U.S. import laws to trade with nonmarket economy countries. We made this review to identify improvements needed for more effective and easier administration of these laws. The report accordingly contains recommendations for amending these laws and their implementing regulations.

We are sending copies of this report to the Director, Office of Management and Budget; Secretaries of Commerce and State; United States Trade Representative; Attorney General; Chairman of the International Trade Commission; and interested individuals and organizations in the public and private sectors.

Milton J. Socolar

Acting Comptroller General
of the United States

COMPTROLLER GENERAL'S REPORT TO THE CONGRESS

U.S. LAWS AND REGULATIONS APPLICABLE TO IMPORTS FROM NONMARKET ECONOMIES COULD BE IMPROVED

D I G E S T

Laws and regulations designed to protect U.S. industry from unfair or disruptive imports are difficult to apply to products from nonmarket, principally Communist, countries. Imports from these countries are currently small (1 percent of total U.S. imports), but they could grow.

The argument for refining U.S. import laws and regulations rests on the assumption that the United States will accrue economic and political benefits through increased trade with at least some of these countries. GAO conducted this review to identify needed improvements in these laws, in order to make them more effective and easier to administer. The report is intended to contribute to the debate on proposed legislation introduced in this session of the Congress to revise existing remedies for unfair or disruptive imports from nonmarket economy countries.

ANTIDUMPING LAW SHOULD BE MODIFIED

Dumping occurs when imported merchandise is sold at less than its fair value and causes or threatens to cause injury to a domestic industry. When it is determined that dumping has occurred, antidumping duties are assessed. In the case of imports from nonmarket countries, dumping generally cannot be directly measured because prices, costs, and exchange rates are artificially set.

The antidumping law thus stipulates that when an economy is state-controlled to an extent that a producer's prices or costs cannot be used to determine whether dumping has occurred, a comparison price for its product is to be simulated. This simulation process generally involves selection of a comparable enterprise operating in a market economy and use of its prices or costs for like or similar products.

This process leads to difficulties in selecting surrogate market producers and verifying data.

As a result, the antidumping law as applied to nonmarket economies is difficult to administer, highly unpredictable in outcome, and costly for the parties involved. Relief (assessment of duties) has nevertheless been obtained under the antidumping law. (See p. 14.)

The antidumping law also provides methods to suspend dumping investigations before they are completed, by concluding agreements to settle such cases. Because of the ways in which dumping is calculated in nonmarket economy cases, it is doubtful whether some of these suspension methods could be used. (See p. 49.)

Recommendations

The Secretary of Commerce should

--develop and publish criteria to be used in determining whether a nonmarket economy producer's actual prices or costs could be used in a dumping case. (See pp. 19 and 25.)

--set out the criteria to be used in selecting surrogate producer(s) and publish the reasons for specific selections in individual dumping cases. (See pp. 24 and 26.)

The Congress should amend the antidumping law. GAO recommends two methods for valuing products from nonmarket economies which should be included in the law and be available in all such antidumping proceedings:

--Use the price being charged by the lowest price market producer selling in the United States. (See pp. 20 and 26.)

--Construct a value for the nonmarket producer's product based on valuing its actual factors of production at appropriate market economy prices. (See pp. 22 and 26.)

The Congress should further amend the antidumping law to provide more workable methods for suspending nonmarket economy dumping investigations. GAO recommends two different methods for concluding agreements; one involves eliminating sales at less than fair value and the second involves eliminating injury to domestic industries. (See p. 51.)

GAO is prepared to work with the appropriate committees of the Congress to devise legislative language for these recommendations.

Agency comments

The Departments of Commerce, Justice, and State agree with GAO's conclusion that actual nonmarket economy prices or costs should be used, when appropriate, in dumping cases. Commerce agrees with GAO's recommendation that it should develop and publish the criteria for determining when such prices or costs can be used. (See apps. VI, VII, and VIII.)

Commerce and Justice also agree with GAO's recommendation that Commerce regulations be amended to more accurately reflect the criteria used in selecting surrogate countries and producers.

Justice and State raise the concern that the U.S. market price approach by itself does not allow a nonmarket economy producer to demonstrate comparative advantage. Consequently, Justice believes that the constructed value approach should always be made available to provide such an opportunity.

Justice supports GAO's suggested method for suspending dumping investigations designed to eliminate less than fair value sales. Justice is concerned, however, that the second method--based on eliminating injury--could potentially result in anticompetitive agreements. Justice further recommends that, should these methods be adopted, they incorporate adequate safeguards.

GAO agrees with Justice that the first settlement method may be preferable. Nevertheless, GAO believes that, given the current difficulties in calculating dumping in nonmarket economy cases, it is appropriate to consider a settlement method that could avoid the shortcomings of full-scale dumping proceedings while focusing on elimination of injury. GAO agrees that it is important to incorporate adequate safeguards in these methods, and has therefore included Justice's suggestions. (See p. 53.)

NONAPPLICABILITY OF COUNTERVAILING DUTY LAW

U.S. countervailing duty law provides for assessing duties to offset certain foreign subsidies on products exported to the United States. To date, the complexity of identifying and quantifying subsidies on goods from nonmarket economy countries has discouraged U.S. industries from requesting investigations of such subsidy practices.

On the other hand, a new method of estimating subsidies in the recently concluded multilateral Agreement on Subsidies and Countervailing Measures makes it much easier to impose countervailing duties on nonmarket economy goods. This could potentially reduce trade with those nonmarket economy countries with which the United States wishes to trade.

GAO discusses alternative approaches to this potential predicament but makes no recommendations because these approaches could present other problems. (See p. 31.)

VIEWS ON MARKET DISRUPTION LAW

One provision of law deals solely with the Communist countries. Section 406 of the Trade Act of 1974 is intended to provide an additional means of protection in the event imports from a Communist country disrupt domestic markets. Before relief can be granted under this section, the domestic petitioner must show that imports caused material injury.

Section 406 has been used infrequently as a basis to petition for relief and the President has granted no relief under it. The International Trade Commission believes that section 406 may have successfully discouraged potentially disruptive imports. (See app. IX.)

Conversely, other U.S. Government and private sector parties involved in trade believe that section 406 inhibits increased trade with Communist countries. GAO did not determine the section's impact on such trade. If, however, Congress in its deliberations determines that section 406 is discouraging desired trade with Communist countries, it could amend the section, without significantly increasing the risk

to U.S. producers, to enable some countries to be exempted from its coverage. Suggested conditions for such exemption are discussed on page 40 of GAO's report.

The Office of the United States Trade Representative agrees that the fears which led to the enactment of section 406 have not materialized, and that it should be amended. (See app. X.)

The Justice Department notes that the mere existence of section 406 can have a disruptive effect on trade by adding to the uncertainty and risk businessmen must face when considering commercial agreements with nonmarket economies. Although Justice believes amending section 406 would be a step in the right direction, it recommends that the need for the section at all be given close scrutiny.

Contents

ABBREVIATIONS

GAO	General Accounting Office
GATT	General Agreement on Tariffs and Trade
GDR	German Democratic Republic
ITC	International Trade Commission
MFN	Most favored nation
PRC	People's Republic of China
USTR	U.S. Trade Representative

CHAPTER 1

INTRODUCTION

In recent years, trade between the United States and many nonmarket, principally Communist, countries has expanded appreciably, paralleling recognition of the benefits--both political and economic--of such trade. In engaging in trade with Communist countries, the United States must balance political and strategic as well as economic objectives; it seeks to safeguard and enhance political and national security interests while encouraging trade perceived to be in those interests.

U.S. trade with these countries (often referred to as East-West trade) is complicated by the difficulties in meshing two fundamentally different economic systems. Those difficulties surface in the application of the U.S. antidumping and countervailing duty laws, which were essentially designed to deal with imports from market economies but are less easily applied to nonmarket economy goods. This report explores ways to minimize the difficulties in applying these and other import laws without diminishing the benefits of expanding trade with those nonmarket economies with which the United States wants to trade.

WHO ARE THE NONMARKET ECONOMY COUNTRIES?

U.S. laws and regulations concerning trade with so-called nonmarket economy countries use different terms to describe which countries should receive special treatment. Antidumping laws describe such countries as "State-controlled," while Title IV of the Trade Act of 1974 (addressing the various issues of bilateral commercial agreements, freedom of emigration, and market disruption) refers either to "nonmarket economies" or "Communist" countries. In practice, the Communist countries have to date been singled out for separate treatment, with the following ones being the most active traders with the United States.

Albania	People's Republic of China (PRC)
Bulgaria	Poland
Czechoslovakia	Romania
German Democratic Republic (GDR)	Soviet Union
Hungary	Yugoslavia (note a)

a/Yugoslavia's inclusion in this category remains debatable; although it is a Communist country, it is nonetheless regarded by many as a market economy.

Accordingly, in this report we use the term "nonmarket economy" to describe the Communist countries because the nonmarket nature of their economies is the central issue affecting application of U.S. import laws. Some non-Communist countries also

have nonmarket aspects to their economies. Therefore, the issues, conclusions, and recommendations in this report (except ch. 4) would be equally applicable to such countries.

CHARACTERISTICS OF A NONMARKET ECONOMY

Common elements in the structure and functioning of nonmarket countries' economic systems distinguish them from market economies; these elements include:

--Planned resource allocation: fuels, raw materials, labor, etc. are allocated by establishing economic plans, typically with goals for sectors and enterprises in terms of physical units (i.e., company X should produce Y amount of product Z); production thus does not necessarily fluctuate as supply and demand change.

--Administratively set domestic prices: domestic prices are set by central planning authorities and do not fluctuate in response to supply and demand; prices generally reflect neither cost nor demand, are divorced from world prices, and are, therefore, "irrational" in a market sense.

--Nonconvertible currency: currency systems are domestic systems only; currency may neither be transferred outside the country nor freely converted into any other currency. Official exchange rates for Western currencies and for currencies of other members of the Council for Mutual Economic Assistance 1/ are administratively fixed by the respective governments and are not generally determined by supply and demand.

Under these economic systems, profitability and efficiency in a market sense cannot be directly measured. Enterprises may appear either profitable or unprofitable merely because their products are priced very high or very low. Apparent profits are heavily taxed, while apparent losses are underwritten by the cenral government with the aim of maximizing social benefits. The primary constraint in these manipulations is that "profits" and "losses" must balance.

Nonmarket economies, for political reasons, have tended to be more closed than market economies; production and consumption data normally are not made public. Thus, in many of these countries, divulging government or enterprise operating data is a violation of domestic law.

1/See glossary.

POLITICAL AND ECONOMIC SETTING

The U.S. decision to maintain or to expand trade relations with these nonmarket economies is both political and economic. Government policies that foster or curtail trade may sometimes reflect political decisions to use trade as a lever in the overall relationship with a nonmarket economy government. Of course, trade must have a sound economic basis in order to attract U.S. commercial interest. Trade with these nonmarket countries and the development of greater economic interdependence can make important contributions to improved political relations with the West. Furthermore, the interchanges that accompany trade may promote better mutual understanding between the different political and economic systems. This general view of the value of trade was reflected in the Final Act of the Conference on Security and Cooperation in Europe concluded in Helsinki in 1975. (See app. I.)

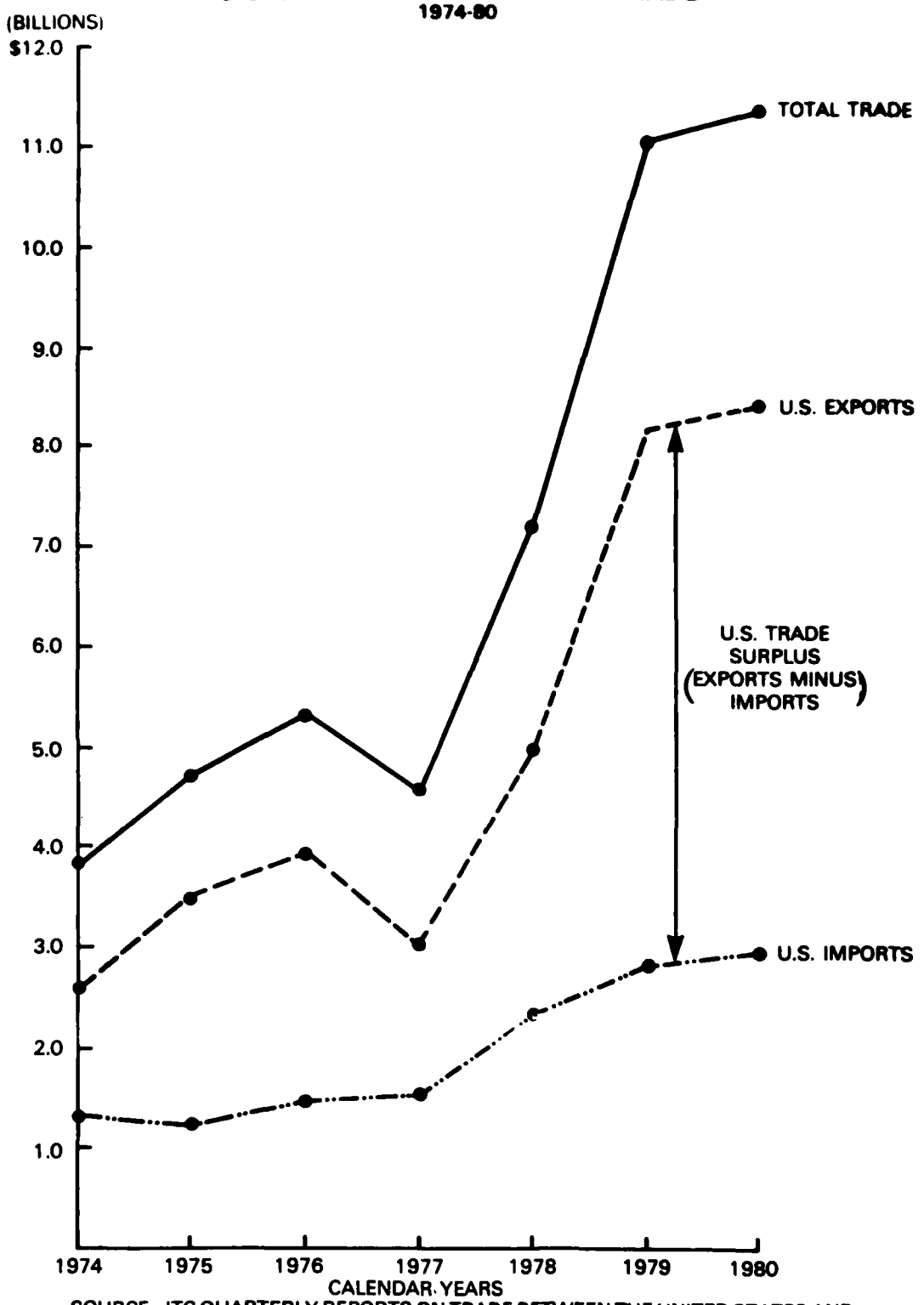
U.S. policy is to provide the nonmarket economy countries with alternatives to trading solely among members of the Council for Mutual Economic Assistance. In addition, the United States has encouraged various nonmarket economies to participate in international trade and financial institutions. (See app. II.)

It is important to recognize, however, that the United States has, for various reasons, differentiated among the nonmarket countries in establishing and maintaining trade and economic relations. For example, it now extends most-favored-nation (MFN) tariff treatment to products imported from Poland, Hungary, Yugoslavia, Romania, and the PRC but not to products from other Communist states, such as the Soviet Union and the GDR. The Soviet Union's invasion of Afghanistan resulted in a partial U.S. embargo of that country without interrupting trade between the United States and the countries of Eastern Europe. (See app. III for a detailed breakdown of U.S. commercial relations with nonmarket economy countries.)

From an economic perspective, the nonmarket economies have the long-term potential to buy and sell much more in world markets than they do presently. These countries comprise about one-third of the world's population and about one-quarter of its land area. Their combined gross national product is roughly equal to that of the United States.

U.S. trade with these countries is relatively small, but growing, and the balance has tended to be heavily weighted in favor of the United States, as shown in the graph on the next page. In 1980, U.S. exports to the nonmarket economies were valued at $8.37 billion while imports from these countries totaled $2.94 billion. Total U.S. exports reached $220.7 billion, while imports totaled $240.8 billion. A large portion of the imports from nonmarket countries consists of industrial raw materials, such as chrome, titanium, and platinum group metals, which are essential to the U.S. economy and are not

U.S.-NONMARKET ECONOMY TRADE
1974-80



SOURCE: ITC QUARTERLY REPORTS ON TRADE BETWEEN THE UNITED STATES AND NONMARKET ECONOMY COUNTRIES

available in sufficient amounts from domestic sources. Manufactured products and processed agricultural goods are also imported, and many of them compete with domestically produced goods. (See app. IV for details on imports from these countries.)

Generally, the nonmarket countries' ability to purchase U.S. products depends on their ability to sell their goods for U.S. dollars or other major convertible currencies. 1/ Their domestic currencies cannot be used in international commercial transactions nor legally transferred outside the country and there is no market exchange rate for them. To minimize shortages of convertible currencies, enterprises of nonmarket economies are sometimes encouraged or required to generate exports to earn convertible currencies to at least partially offset their expenditures of convertible currencies. To further alleviate drains on scarce foreign exchange, these enterprises sometimes seek to enter into countertrade, or barter, arrangements (generally a transaction in which a market economy exporter agrees to take at least partial payment in products of the nonmarket economy country). Because of the advantages of such arrangements to the nonmarket economy countries, potential Western exporters able to enter into countertrade arrangements can increase their sales opportunities.

East-West trade benefits the U.S. economy in the same way that all international trade conveys benefits. U.S. consumers may benefit from the broader range of products available, and inflation may be dampened by the increased competition. The positive economic benefits of East-West trade, however, should not be overestimated; the volume of trade involved is small in relation to the total output of U.S. industry and to the volume of U.S. trade.

U.S. TRADE PHILOSOPHY AND THE LEGAL FRAMEWORK FOR EAST-WEST TRADE

The United States seeks to achieve open and nondiscriminatory trade with all countries, including those with nonmarket economies. The intent is to harmonize, reduce, and eliminate U.S. tariffs and other trade barriers in exchange for reciprocal treatment of U.S exports and to protect domestic industry only from unfair or injurious foreign competition. This policy rests on the belief that, if all countries have free access to each others' markets and if selling prices are fairly related to costs, all would benefit from worldwide production ultimately being accomplished by the most efficient producers.

1/Currencies which can be freely converted into other currencies, such as the Japanese yen or German mark, at an exchange rate essentially determined through the interaction of supply and demand.

In pursuit of that objective, the United States, along with virtually all major market economy countries and Czechoslovakia, Yugoslavia, Poland, Hungary, Cuba, and Romania, is a contracting party to the General Agreement on Tariffs and Trade (GATT) (61 Stat. A3, T.I.A.S. No. 1700, Oct. 30, 1947). The GATT, among other things, consists of agreed principles and rules governing trade of the contracting parties. It also provides a broad international forum for friendly discussion and settlement of mutual problems of international trade. Lengthy multilateral trade negotiations under GATT auspices have been held in recent years, resulting in codes of conduct for signatories in dealing with unfair trade practices.

The U.S. trade laws discussed below have been enacted to protect against the adverse effects of unfair and disruptive imports in general as well as to foster improved trade relations.

Unfair trade relief measures

U.S. laws provide domestic industries with a number of mechanisms for seeking relief from alleged unfair trade practices of foreign competitors. These laws are based on the premise that unfair trade practices jeopardize the ability of industries to compete against enterprises that do not have to play by the same market rules. Some of the principal remedies for unfair trade practices are as follows.

1. The Tariff Act of 1930

   --Section 731 (19 U.S.C. 1673) authorizes the collection of duties to offset unfair price differentials which either injure or retard establishment of a domestic industry.

   --Sections 303 and 701 (19 U.S.C. 1303 and 1671) authorize the collection of duties to offset certain types of grants or subsidies.

   --Section 337 (19 U.S.C. 1337) authorizes the U.S. International Trade Commission (ITC) to investigate allegedly unfair methods of competition in the import of articles into the United States (usually applied to articles entering the United States in violation of claims under U.S. patents).

2. The Trade Act of 1974

   --Section 301 (19 U.S.C. 2411) authorizes the President to retaliate against foreign countries which unjustifiably or unreasonably restrict imports of U.S. goods and services.

We focused on the antidumping and countervailing duty statutes (sections 731, 303, and 701 of the Tariff Act of 1930). These laws are difficult to apply to imports from nonmarket economy countries because they involve cost and price concepts that are not readily translatable to the nonmarket setting.

The antidumping provisions were designed to protect domestic producers from unfair pricing actions of foreign producers. Dumping occurs when imported merchandise is sold at less than its "fair value" and causes material injury to a domestic industry. When dumping is identified, the difference between the sales price in the United States and the "foreign market value" is added to any existing tariff as an antidumping duty.

Sections 303 and 701 provide protection against certain foreign "bounties or grants," (i.e., subsidies). The Commerce Department is responsible for determining whether a subsidy exists and, if so, imposing a countervailing duty. Such duty is in addition to any existing duties to which the merchandise is subject. When required by law, the ITC must determine whether a domestic industry is (1) being materially injured or threatened with material injury or (2) its establishment is being materially retarded by reason of the subsidized imports before a countervailing duty would be imposed.

Import relief measures

Article XIX of the GATT provides the international groundrules for "escape clauses" through which domestic industries may be granted relief from increased, injurious imports. Accordingly, provisions of U.S. law incorporate mechanisms for granting import relief from fair but disruptive imports.

Section 201 of the Trade Act of 1974 (19 U.S.C. 2251) requires the ITC to investigate complaints filed by domestic industries, unions, or workers claiming that they are injured or threatened by increasing imports. If the ITC determines that imports are a cause of serious injury "not less than any other cause," it may recommend relief in the form of adjustment assistance or temporary import restrictions, such as quotas or tariffs. The President can accept a recommendation for relief, or he can modify or reject a recommendation subject to congressional override. Underlying this law is the premise that a U.S. industry occasionally may need temporary breathing space to adjust to structural changes in the market, which often are caused by tariff reductions or other trade-liberalizing measures. The period of relief is intended to be used to permit the industry either to become competitive or to shift to another line of business.

When imports from Communist countries disrupt domestic markets, section 406 of the Trade Act of 1974 (19 U.S.C. 2436) allows domestic industries, unions, or workers to submit petitions to the

ITC alleging that such imports have been a significant cause of, or threaten, material injury. 1/ The ITC has 90 days to investigate and report its findings and recommendations for relief (if injury has been found) to the President. The President then has 60 days to determine whether to grant relief and what form it will take.

Ways to prevent or
expeditiously resolve trade disputes

U.S. antidumping, countervailing duty, and import relief statutes provide for the use of administrative proceedings to consider claims of unfair or injurious imports. U.S laws also offer other means for avoiding or expeditiously resolving trade disputes, including trade monitoring systems, consultations, and settlements to collectively

--identify and anticipate potential trade problems;

--reduce reliance upon possibly lengthy, costly, and uncertain administrative proceedings; and

--generally strengthen and improve trade relations with the nonmarket economies.

NONMARKET ECONOMY
TRADE POTENTIAL

The argument for refining the current laws and regulations governing trade with the nonmarket economies rests on the assumption that the United States will accrue significant economic and political benefits through trade with at least some of these countries.

The potential of nonmarket economy markets is considerable--the Commerce Department estimates that the value of exports to the PRC will increase from about $3.7 billion in 1980 to $5.3 billion by 1985. Nonmarket economy countries' market potentials, however, are linked to their foreign debt postures and need for hard currency. Most nonmarket economies have some Western debt exposure; as a group, the countries of the Council for Mutual Economic Assistance have reached a debt level that constrains the growth rate of their trade with the West (Poland is negotiating rescheduling of its estimated $20-billion foreign debt). Thus the ability of these countries to import from the West and to service their debts is closely tied to their ability

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1/Section 406 investigations may also be self-initiated by the ITC or begun at the request of the President or U.S. Trade Representative or by resolution of either the House Ways and Means or Senate Finance Committees.

to export to the West, which is partly related to U.S. laws and the way they are administered.

As nonmarket economy exports expand, the potential for an increasing number of dumping, countervailing, and import relief cases also expands. Until recently, nonmarket economy exports consisted of primary products (i.e., copper, coal, soda ash) or standard semiprocessed goods.

During the 1980s this is expected to change. Because of a need to optimize their use of raw materials, the nonmarket economy countries are shifting their export priorities toward increasingly sophisticated manufactured products--an area in which questions of dumping and import relief measures are of the greatest importance to U.S. domestic industry. Again, the PRC demonstrates this trend; it is shifting its economic growth emphasis from raw materials to precisely those types of light industrial products which have triggered trade disputes in the past (e.g., textiles, footwear, bicycles, consumer electronic products, clocks, and so forth).

Management decisions by both U.S. and nonmarket economy enterprises can be influenced by perceptions of how U.S. import laws will be applied. The greater the uncertainty created by administration of these laws, the greater the disincentive to enter into long-term commercial arrangements, particularly those involving long-term, capital-intensive projects.

OBJECTIVES, SCOPE, AND METHODOLOGY

The purpose of our review was to find ways to improve certain of the tools available for protecting U.S. interests affected by imports from nonmarket economy countries and to contribute to the debate on proposed congressional legislation dealing with such imports. Underlying our review was the assumption that some U.S. measures for providing relief from unfair or disruptive imports were particularly difficult to apply to goods from the nonmarket economies. That assumption was founded upon prior studies of East-West trade issues, 1/ our March 15, 1979, review of U.S. antidumping law, 2/ and consultations with knowledgeable trade experts. Therefore, we focused on (1) determining the reasonableness of criticisms of existing laws and (2) identifying various alternatives to existing laws that could improve the U.S. ability to provide import relief when needed without unnecessarily discouraging trade or jeopardizing other economic or political objectives.

1/Studies reviewed include the Interface I conference proceedings, the Office of Technology Assessment's Technology and East-West Trade, and Issues in East-West Commercial Relations, printed by the Joint Economic Committee of the Congress.

2/U.S. Administration of the Antidumping Act of 1921 (ID-79-15).

In reviewing U.S. laws concerning unfair trade practices, we concentrated on the antidumping and countervailing duty statutes. Other laws are available for dealing with other forms of unfair trade practices, such as patent or copyright infringements, but their use poses no special problems regarding imports from nonmarket economy countries. Similarly, we reviewed the market disruption provision of the Trade Act of 1974 (section 406), but did not analyze the general import relief provisions (sections 201-203). We did not attempt to quantify the extent to which U.S. trade or other interests were being served or harmed by existing legislation nor did we examine policies or circumstances affecting U.S. exports to the nonmarket economies, because these policies are the subject of separate GAO reviews.

In reviewing the application of current laws and in developing alternatives, we analyzed and evaluated:

--ITC reports and other data related to the six petitions for relief under section 406 of the Trade Act of 1974.

--Complete case files for 12 of 42 dumping petitions filed from January 1959 to March 1981 alleging dumping by nonmarket economy producers. These cases were selected because the ITC found that domestic producers had been injured and because the administrative process had been completed. Portions of other cases were also reviewed.

--Background materials for, and recorded proceedings of, various bilateral commercial commissions.

--Published and unpublished writings by trade law experts on the issues under study.

During our review, we talked with and obtained information from:

--Individual Commissioners and representatives of the ITC and officials of Commerce's International Trade Administration regarding the administration of the U.S. antidumping and countervailing duty statutes and matters related to injury determinations.

--Officials of the Department of State and the Office of the U.S. Trade Representative (USTR) to obtain their perspectives on East-West trade policy and U.S. negotiating objectives.

--Justice Department officials to explore the antitrust implications of various proposed regulatory and legislative changes.

--Trade law attorneys (representing both domestic and foreign interests) who provided additional insights into

application of current laws and potential areas and methods of improvement.

--Members of the American Bar Association's Committee on International Trade to discuss various proposals for changing current U.S. laws and regulations.

We attended the June 1980 Interface II proceedings in Poznan, Poland, a conference attended by U.S. and Polish trade experts and government officials and devoted to the subject of the difficulties in trade between dissimilar economic systems.1/

To further improve our understanding of East-West trade issues and to prepare for our overseas work, we met with representatives of the Yugoslav, Hungarian, Polish, and German Democratic Republic Embassies in Washington, D.C. Our overseas work (in Poland, Hungary, Yugoslavia, the Federal Republic of Germany [West Germany] and Belgium) consisted of meetings with high-level Polish, Hungarian, and Yugoslav Government and foreign trade representatives, discussions with U.S. Embassy personnel in Warsaw, Budapest, and Belgrade, and interviews with West German Government and banking officials. We also talked with representatives of the Commission of the European Community to obtain information concerning the European Community's approach to antidumping and countervailing duty policies and procedures.

We prepared a paper outlining a range of possible changes to existing laws and regulations for use in our discussions with Government officials, lawyers, and other trade experts. These discussions provided the basis for our subsequent judgments on possible changes. In developing the proposals (and our recommendations), we used certain basic premises, including

--cases dealing with nonmarket economy products should be processed, when possible, as if they involved products from a market-oriented producer or country;

--new procedures should be neither more uncertain nor more difficult to administer than present procedures;

--relief, when determined appropriate, should be certain and timely; and

--changes should be fair to both domestic producers who invoke the law and the foreign suppliers who seek access to U.S. markets, thereby balancing the interests of domestic businesses and the benefits to consumers accruing from the availability of competitive, low-priced goods.

1/Cosponsored by Adam Mickiewicz University (Poznan) and Georgetown University's International Law Institute, June 4-14, 1980.

CHAPTER 2

U.S. PROCEDURES FOR RESOLVING PETITIONS ALLEGING DUMPED IMPORTS FROM NONMARKET ECONOMY COUNTRIES SHOULD BE IMPROVED

U.S. antidumping law provides methods by which domestic industries can obtain relief from unfairly priced imports that place them at a competitive disadvantage. Methods used in assessing whether the import prices of products from nonmarket economies are unfair are increasingly difficult to administer, highly unpredictable in outcome, and costly for the parties involved. Methods for determining the standard against which import prices are measured could be improved to reduce these problems.

Under U.S. law, dumping occurs when imported merchandise is sold at less than its "fair value" and causes injury to a domestic industry. 1/ The fair value of a product (referred to as foreign market value) is defined as the price at which it is sold in either the producer's home or export markets. When such prices cannot be used, foreign market value is then considered to be the value that would enable the foreign producer to recover reasonable costs, expenses, and profit over a period of time (referred to as "constructed value").

When it is determined that dumping has occurred, antidumping duties are assessed in an amount equal to the difference between the U.S. price of the product and the foreign market value. This difference is referred to as the dumping margin. (See app. V for a sample calculation.)

METHODS FOR JUDGING UNFAIR PRICING OF NONMARKET ECONOMY PRODUCTS

Normal methods of judging the unfairness of a product's price--by comparing its home or export market prices or costs to its U.S. price--generally do not work when the producer is located in a nonmarket economy. Production levels, prices, and costs in these economies do not reflect supply and demand and their domestic currencies have no market exchange rate.

U.S. law (19 U.S.C. 1677b et seq.) recognizes the possible unreliability of nonmarket economy producers' prices and costs for use in testing for dumping and sets forth a hierarchy of methods for computing a foreign market value for comparison with the U.S. import price. In essence, these methods simulate what a

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1/Specifically, the ITC must determine that an industry in the United States is "materially injured," is "threatened with material injury," or its establishment is "materially retarded."

nonmarket economy enterprise's prices or costs would be if it were operating in a market environment. The simulation methods use a surrogate (substitute) market country's domestic or export prices or a constructed value of production factors and related items used by the nonmarket producer and priced in a surrogate market economy.

Commerce Department implementing regulations (19 CFR part 353) accordingly establish the following hierarchy of specific approaches for calculating foreign market value.

1. Use the home market prices (adjusted for differences such as quantities sold, circumstances of sale, physical characteristics, and level of trade) of the same or similar merchandise in a surrogate country.

2. Use the export prices (adjusted as above) of the surrogate country.

3. Construct the value of a surrogate producer's merchandise by using its costs (adjusted as above) and adding at least 10 percent for general and administrative expenses and at least 8 percent of that total for profit.

4. Construct the value by using the nonmarket producer's production and component factors (i.e., amount of raw materials, energy, labor, etc.) and ascertaining their value in a market economy (for ease of reference we call this approach "simulated constructed value").

The first three methods involve using the prices or costs of a surrogate producer--an enterprise in a market economy country whose product is not the subject of the dumping investigation. How these methods work and the drawbacks associated with surrogate producers are discussed below. The fourth method (simulated constructed value), which does not involve the product of a surrogate producer, is discussed on page 22.

Commerce regulations provide that, in selecting a surrogate market economy for use in steps 1-3 above, Commerce will first look for economies comparable to the nonmarket economy in terms of generally recognized criteria, such as per capita gross national product and infrastructure development (roads, harbors, utilities, etc.). If no comparable market economies are available for use in the simulation, then any market economy could be selected; however, the United States would be used only if no other market economies were available.

Commerce selects from within the chosen surrogate economy the producer whose operations and product would require case analysts to make the fewest adjustments. Case analysts may adjust the surrogate's prices or costs to reflect differences that distort the validity of the comparison. Some of these adjustments,

although very subjective, are routinely made by case analysts whether or not a surrogate producer is used to ensure that similar transactions are compared. These adjustments would correct for differences in the product, quantities sold, circumstances of sale (warranties, trade-ins, selling costs, etc.), and the levels of sale (e.g., retail versus wholesale).

Other adjustments are made only when a surrogate producer's prices or costs are used. For instance, other adjustments might be required for differences between the surrogate producer and the allegedly dumping enterprise in terms of (1) the level of economic development of the home countries, (2) production technologies used, (3) the scale of production, (4) type and quality of material inputs (e.g., the quality of ore used), and (5) the utilization rate of production capacity. These adjustments are much more arbitrary than those normally made.

DRAWBACKS OF THESE METHODS

These simulation procedures parallel in appearance the process used when the alleged dumping producer operates in a market environment and the product's foreign market value is based on its prices or production costs. However, the combined effect of difficulties in the surrogate selection process, data verification, and the need for subjective adjustments makes the outcome of dumping cases involving a surrogate producer's product highly unpredictable and of limited economic validity.

Administrative drawbacks

The first difficulty in simulating foreign market value centers on identifying those market economy countries which are comparable in economic development and whose producers would be reasonably representative surrogates in terms of their production technology, product characteristics, and selling practices. When such market economies are identified, host governments and producers willing to cooperate freely in the simulation must be found.

Options for selecting a market economy at a comparable level of economic development are usually presented in statements by counsel for the domestic and foreign producers and by the administering authority's staff. For instance, in a dumping petition involving menthol from the PRC, the petitioner proposed using Brazil as the surrogate economy, the respondent proposed Paraguay, and the Commerce Department economist proposed the Republic of Korea. (The case analyst selected Paraguay.)

Some governments have not endorsed or have openly discouraged firms within their jurisdictions from participating in dumping simulations. This limits the ability of Commerce to use the potential surrogate whose prices or costs would require the

fewest adjustments. In one recent case, a foreign market research firm's study supporting the U.S. industry's dumping petition received confidential treatment, partly due to fears of triggering punitive foreign government action against the research firm.

Once an appropriate economy has been identified, practical problems affect the selection of potential surrogate producers. For instance, potential firms have been ruled out because of the suspected existence of government production subsidies. Other firms simply refuse to cooperate.

Selected surrogate firms do not always offer unrestrained cooperation. One firm took a year to provide a price list. Also, since foreign firms often have an economic interest in how dumping cases are resolved, they may skew or manipulate the data they offer. In some industries, hidden discounts are prevalent and make it difficult to rely on list prices; in one investigation report, the case analyst concluded that "the identification of world market prices is difficult since much secrecy shrouds pricing in this commodity."

To minimize the likelihood of misinterpreting information, Commerce case analysts make onsite verification of the surrogate's data; this is not an audit but a general assessment of the reasonableness of the data and methods used and is generally completed in a few days. Verification becomes significantly more difficult when a cost-of-production determination is involved. Investigators reported that they were very much at the "mercy" of the companies involved when verifying costs for product variations, general expenses, overhead, and such indirect costs as utilities, management, staff time, etc. These verifications are essentially analyses of source documents, and the investigators have little alternative but to rely on reasonable explanations offered by the firms about their accounting transactions.

Exchange rate fluctuations and differences in accounting systems among enterprises in other countries further compound the difficulties in making realistic price simulations.

The cumulative effect of the problems with identifying willing, appropriate surrogate producers and verifying, analyzing, and adjusting their data limits the economic validity of these exercises and causes their outcome to be unpredictable.

Concerns of U.S. and foreign producers

The uncertainties inherent in the simulation methods involving surrogate producers, coupled with the high legal costs of filing or responding to a dumping petition, concern both U.S. and foreign producers.

Trade law attorneys point out that whether a case is won or lost generally hinges on the surrogate selected and adjustments

made to its prices or costs; these are subjective decisions that cannot be predicted with any degree of certainty. Therefore, the nonmarket economy producer has little basis for knowing in advance what price must be charged to avoid dumping (market economy countries generally must be sure only that their prices are consistent from market to market). Domestic producers also face uncertainty regarding whether or not to gamble the expense of filing dumping petitions on the vagaries inherent in the system. Although no conclusive data is available, the costs and uncertainty reputedly discourage U.S. producers from filing petitions even though they believe dumping is occurring.

According to lawyers who handle dumping cases, a straightforward case involving a foreign market economy producer would cost $50,000 to $75,000; costs for complex cases increase dramatically. Cases involving nonmarket economy producers are complex because legal debate over surrogate selection and adjustments requires substantial legal and economic research.

HOW TO IMPROVE METHODS FOR ASSESSING WHETHER NONMARKET ECONOMY PRODUCTS ARE UNFAIRLY PRICED

U.S. methods for assessing whether imports from nonmarket economies are unfairly priced could be improved by:

--Using the nonmarket economy producer's prices or costs when possible, which would minimize simulations of foreign market value and avoid the problems associated with surrogate selection and use.

--Using simulation methods which (1) do not require the cooperation of foreign governments or producers not party to the investigation, thereby avoiding the most difficult aspects of ensuring data reliability, and (2) require fewer subjective adjustments by case analysts, thereby reducing much of the uncertainty and subjectivity of the current simulation method.

Using actual prices or costs

Although U.S. law or regulation does not preclude using a nonmarket economy respondent's prices or costs in testing for dumping, these amounts are not reliable indicators of economic efficiency. Such prices or costs are generally regarded as unusable in dumping cases. We believe, however, that opportunities for using these producers' prices or costs are increasing at least slightly because joint ventures with Western firms are increasing and because economic reforms in some countries increase the extent to which costs and prices reflect market forces and improve the ability to assign a market-type exchange rate to their currencies.

Joint ventures

Because of their capital structure and organization, some joint ventures between Western firms and nonmarket economy enterprises might represent islands of market behavior. While such joint ventures may be still somewhat rare, when they keep accounts in a hard currency, operate for a profit, and have labor, utility and rent costs generally comparable to those in representative market economies, enough market influence might be present to allow their export prices to be used in dumping proceedings. Hungary, Bulgaria, Romania, Yugoslavia, and the PRC have legislation permitting such ventures. In Romania 1/, a U.S. firm's equity joint venture

--is capitalized in a freely convertible currency;

--keeps accounts in a freely convertible currency;

--obtained most of its machinery and technology in market economies (paid for in convertible currency); and

--makes a significant proportion of plant output with imported subassemblies from market economy suppliers, the value of which is determinable in a market sense.

In the case of this joint venture, according to the U.S. partner data could be made available to judge whether the venture's export prices could be used in a dumping proceeding. The structure and operating environment of this joint venture is very much like similar joint ventures in developing market economy countries where Western firms' capital and expertise combine with developing countries' labor or other resources.

Hungary's joint venture legislation allows foreign partners to be majority shareholders in commercial or service, but not in manufacturing, joint ventures. Hungary now has three equity joint venture agreements with Western firms and several hundred cooperation agreements (mostly with West German, Austrian, and Italian firms) that do not involve equity participation.

Bulgaria's joint venture decree sets no limit on the degree of foreign participation and allows the foreign participant to repatriate all after-tax profits. As of July 1981, Bulgaria had four equity joint ventures with Western firms.

The PRC signed about 20 joint venture agreements during 1980. Many prospective joint ventures have been stalled by the PRC's

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1/As a member of the International Monetary Fund, Romania is committed to evolving its domestic currency toward a single exchange rate.

shortage of investment capital and by foreign firms' uncertainties over taxes, legal questions, labor relations, and quality control. Many of the signed agreements concern export-oriented industries, such as machinery and textiles.

Economic reforms

Economic changes being introduced in some of these countries may ultimately change their economic behavior to the degree that their cost-price systems could be used in testing for dumping margins. Hungary and the PRC are introducing various market mechanisms, and Yugoslavia is widely considered a market economy.

Hungary's economic reforms have been significant enough that, if continued, economic experts 1/ believe its prices will be principally set by market forces by the mid to late 1980s.

Yugoslavia's economy is the result of ongoing domestic reform which transformed a Soviet-type economy of the late 1940s into one similar to those of countries generally considered to have market economies. It considers itself to be a Communist country with a market economy because:

--Economic decisions are made at the enterprise level, with little or no direct government influence. 2/

--The national economic plan is "indicative" rather than binding--it imposes no legal or mandatory obligations on individual enterprises.

--National and state annual budgets are public documents (the U.S. Embassy in Belgrade prepares an English-language translation and line item analysis annually) and the local media reports parliamentary debate on these budgets.

--The dinar, while not used in foreign trade transactions, can be valued in terms of convertible currencies and a market exchange rate exists which is a fairly reliable reflector of its value.

1/Experts associated with major banks with extensive business experience in Eastern Europe and an economic research institute specializing in Eastern Europe economies.

2/Key features of Yugoslavia's self-management socialism are (a) worker ownership of enterprises, (b) economic decision-making assigned and restricted to individuals directly affected by the decision, (c) direct exercise of power by these individuals without intermediaries (i.e., a managerial class or the state), and (d) operation of firms to earn profits.

--Capital markets tend to be regional, not national, and the self-managed banking sector has considerable competence and autonomy in allocating investment resources.

--Yugoslav enterprises publish annual reports disclosing income statements, balance sheets, and other operating data using accounting principles very similar to those generally used in the United States.

Although even the Yugoslav economy is somewhat distorted by government controls over such things as purchasing power, market economies can also experience similar distortions. The issue is one of degree; at what point do nonmarket economies reflect enough market behavior to enable their prices or costs to be used in dumping cases?

Commerce regulations should clarify when actual prices or costs may be used

The Commerce Department has not published the specific criteria it would use in determining whether actual nonmarket economy prices or costs could be used in dumping investigations. Although we do not want to overstate the extent to which using such prices or costs might be appropriate, we believe that including such criteria in the U.S. Code of Federal Regulations would be helpful to petitioners and respondents willing to provide Commerce with verifiable information for determining whether prices or costs can in fact be used.

The criteria to be included would reasonably focus on economic factors related to the country, sector, and enterprise. National economy factors might include a domestic price system which reflects supply and demand and the existence of a single market exchange rate for the domestic currency 1/ or the ability to approximate such a rate. 2/

1/The concept of currency convertibility has always been ambiguous; the Articles of Agreement of the International Monetary Fund have replaced the concepts of a "convertible currency" and "currency convertible in fact" with "freely usable currency," which is defined as being (a) widely used to make payments for international transactions and (b) widely traded in principal exchange markets. It is unlikely that the domestic currencies of the nonmarket economies will fit this definition in the foreseeable future. The Yugoslav dinar's degree of convertibility may be acceptable for this purpose.

2/In recognition of the fact that exchange rates do not reflect the relative purchasing power of different currencies, the U.N. Statistical Office, World Bank, and International Comparison Unit of the University of Pennsylvania have cooperated in developing a method to derive comparative currency purchasing power measures. (See World Bank publication summary, The International Comparison Project.)

Sectoral and enterprise factors might include:

--A high degree of decentralized decisionmaking with enterprise control over production levels, product mix, marketing, and pricing.

--Enterprise goals expressed in terms of earnings, not physical output units.

--Valuation of inputs in accordance with world prices.

--Documented and verifiable records of sales.

--Books and records in verifiable, acceptable format.

--Physical input units/costs and major indirect costs that can be verified as they are in the United States.

--Capitalization in a convertible currency.

--Acquisition of significant percentages of plant and/or real estate assets under market conditions.

Ways to reduce the drawbacks of simulations

When, as is likely in most cases involving nonmarket economies, actual prices or costs cannot be used, it will continue to be necessary to simulate such prices or costs. The drawbacks of the current simulation methods discussed earlier could be reduced and other advantages achieved if these methods were abandoned in favor of the two approaches discussed below.

The U.S. market price approach

A method of calculating the foreign market value of products from nonmarket economy countries on the basis of prices in the United States could greatly reduce the drawbacks of the current methodology. This approach (which we term the "U.S. market price approach") would not rely on the cooperation of foreign governments or producers and could reduce the number of subjective price adjustments. Under this approach, the term "foreign market value" would be defined for purposes of state-controlled economy investigations as the weighted average price of a representative sample of sales in the United States of the lowest price market producer doing a reasonable volume of business in the U.S. market. Essentially the methodology would:

1. Determine the universe of individual producers 1/ from market economies, including the United States, that supply a reasonable portion of apparent U.S. consumption of like articles to enable the administering authority to determine a price which can be used as foreign market value.

2. Determine, through sampling, prices in the United States 2/ over a recent representative time period of these producers or group of producers (excluding those producers of like articles subject to a preliminary or final dumping/countervail determination).

3. Adjust these prices for differences in quality of product, quantity, level of trade, duties, or other factors required to ensure comparability, with no further adjustments for differences in manufacturing scale or technique or for the level of development of the producing country.

4. Use as foreign market value the price of the producer whose weighted average price is lowest.

5. Compare this foreign market value with the nonmarket economy respondent's price (landed, duty paid U.S. port of entry) to establish the dumping margin (if any).

The way to calculate a dumping margin using this approach is shown below.

Market economy producers selling in the U.S. market	Weighted average price of representative transactions in the U.S. market
U.S. producer #1	$10
U.S. producer #2	$12
European producer #1	$ 9
European producer #2	$ 8
Canadian producer	$10

1/If no individual producers provide a sufficient amount of apparent U.S. consumption, then the aggregate of producers within a country could be used.

2/U.S. producers' prices would be ex-factory; other market economy producers' prices would be landed, duty paid U.S. port of entry.

The weighted average U.S. price of European producer #2 would be used as the foreign market value because it is the lowest. If the nonmarket producer's price is $7, the dumping margin would be:

Foreign market value	$8
Less respondent's U.S. price	-7
Dumping margin	$1

This approach credits nonmarket economy enterprises with some comparative advantage by basing the foreign market value on the prices of producers with the lowest average price in the U.S. market. This advantage may be counterbalanced to a degree, however, by the general problems facing nonmarket economy exporters attempting to enter the U.S. market. The U.S. market price approach--in effect establishing a floor price for "safe" sales in the United States--could effectively preclude such exporters from pursuing a market strategy of selling at low prices while establishing customer acceptance and a reputation for quality and reliability. Nonmarket economy exporters must also contend with "psychological" barriers to competition--for example, the possible "stigma" attached to trading with a "Communist" country.

The administrative advantage of this approach is that it eliminates the need to analyze other market economies and their producers for suitability as surrogates as well as the need to gain their cooperation. The administering authority also is freed from the need to make what are often very subjective adjustments to a surrogate producer's selling prices for differences in production technology and scale.

In addition, this approach would give both nonmarket economy exporters and prospective U.S. petitioners a significantly clearer idea of what the foreign market value of a given product is likely to be (to the extent they can gauge the lowest weighted average price in the U.S. market). This contrasts with current simulation methods, where it is not possible to predict which producer's prices would be used or what adjustments made.

A weakness of this approach is that it presumes that nonmarket producers are never the most efficient producers of a product. To offset this weakness, we believe that the simulated constructed value method, which is not now always available, should be an option in any dumping proceeding.

Simulated constructed value

Simulated constructed value essentially is a method of calculating foreign market value of a nonmarket producer's product

based on valuing its production factors at market economy prices. The actual production factors (e.g., labor hours, energy, raw materials, and so forth) used by a nonmarket economy producer in making the product under investigation are valued at their going rate in a comparable market economy. This method provides a means for simulating what a nonmarket economy enterprise's costs would be if it were operating in a market economy.

The Polish golf cart case illustrates how this method works. In that case, the actual production factors used to produce the carts, 1/ as verified by the administering authority's case analysts, were then priced in Spain (on the premise that it was at a stage of economic development similar to that of Poland) by an independent engineering firm. Case analysts verified the engineering firm's work and made some adjustments. An amount was added for profit and the total converted from Spanish pesetas to dollars. This total became the foreign market value of the golf carts.

While all the factors used to produce golf carts were valued in a single market country, it might in some cases be more valid economically to value different factors in different countries (considering the same blend of factors currently used to select surrogate producers) and to accept some actual factor costs, such as for components purchased (at arms length) from market economies or raw materials purchased at world prices.

To use this approach, the nonmarket economy producer must provide for and be willing to allow the administering authority to verify the types and quantities of production factors used.

Although there are elements of difficulty and expense in a simulated constructed value exercise and the outcome would not be a precise measure of economic efficiency, we believe it has the following important advantages.

--It is a fair way to permit a nonmarket economy producer to attempt to show it has economic efficiencies.

--It permits the use of production factors within some control of the actual producer.

--It provides costs that can be valued in U.S. dollars.

--It reduces the administrative problems associated with gaining the cooperation of surrogate producers and making the necessary adjustments for differences in production techniques and scales.

1/Factors included materials, labor, factory overhead, and general and administrative expenses.

The simulated constructed value method is provided for in Commerce regulation 19 CFR 353.8(c), issued to implement Commerce's general authority to construct value.

ADJUSTMENTS COULD IMPROVE CURRENT APPROACH DURING THE INTERIM

While ways to substantially improve the methods for resolving dumping petitions, such as those recommended in this report, are being considered, we believe Commerce should make some minor adjustments to its current regulations. These adjustments could potentially improve the current simulation process by better describing the basis for surrogate selection.

Commerce regulations state that the selection of a comparable surrogate economy is to be based on "generally recognized criteria, including per capita gross national product and infrastructure development (particularly in the industry producing such or similar merchandise)." Nevertheless, Commerce's case analysts actually use a blend of macroeconomic and enterprise factors when selecting the surrogate country or producer. Commerce officials believe that doing this better enables them to identify the surrogate whose prices and costs require the fewest adjustments.

We believe that Commerce's actual selection process is reasonable and should be reflected in the implementing regulations. Amending the regulations to indicate the kinds of macroeconomic and enterprise factors that are considered would afford both petitioners and respondents a better basis for arguing which surrogate is the most appropriate.

Also, Commerce has not published decision memoranda stating the basis for surrogate selections in individual cases. Doing so would improve prospective petitioners' and respondents' understanding of the selection process and perhaps improve the quality of petitions and responses.

CONCLUSIONS

Methods of assessing the fair value of products from nonmarket economies should be improved, because the current methods are increasingly difficult to administer, their outcomes are unpredictable, are of limited economic validity, and are costly for the parties involved.

Methods for investigating the alleged dumping of nonmarket economy goods could be improved to:

--Better ensure use of the prices or costs of the nonmarket economy producer, when appropriate, in lieu of simulating prices or costs.

--Derive foreign market value using methods that rely less on cooperation from foreign governments and producers and require fewer subjective adjustments.

--Retain the simulated constructed value method as a means of enabling nonmarket economy producers to attempt to demonstrate comparative advantage.

Current law requires a decision as to whether the economy of a country is "State-controlled" to the extent that its prices and costs cannot be used in ascertaining foreign market value. In fact, nonmarket economy prices or costs will seldom be suitable. However, to provide respondents with a better basis for presenting the case for using actual prices or costs, we believe the Commerce Department should provide criteria in the Code of Federal Regulations for use in making such judgments.

In most cases, however, the actual prices or costs of nonmarket economy producers will not be usable and some alternative valuation method will need to be used. We believe that the administrative drawbacks to current simulation methodologies could be reduced by using the U.S. market price approach described earlier, which also provides both potential petitioners and respondents with a more predictable process.

To offset the major weakness of the U.S. market price approach--the presumption that nonmarket producers are never the most efficient producers of a product--we also believe the simulated constructed value approach should be made available as an option. This approach provides a way for nonmarket producers to attempt to demonstrate economic efficiencies that would justify pricing their product below that of other producers.

Although the simulated constructed value approach is allowed under the general legal authority to construct value, we believe it should be made specifically applicable to nonmarket economies. Retaining the current general language in the law could create uncertainty as to how value would be constructed.

While ways to substantially improve methods for resolving dumping petitions are under consideration, Commerce should provide more explicit guidance on the criteria used to select surrogate countries and producers. It should develop and publish regulations outlining the macroeconomic and enterprise factors it considers in choosing a surrogate producer. Also, following a surrogate selection decision, Commerce should publish the reasons for its decision.

RECOMMENDATIONS TO THE SECRETARY OF COMMERCE

We recommend that the Secretary of Commerce, to improve the process of deciding when to use simulation methods, direct the

Deputy Assistant Secretary for Import Administration to develop and publish criteria in the Code of Federal Regulations for determining whether a respondent's actual prices or costs can be used.

The Secretary should further direct the Deputy Assistant Secretary to amend Department regulations to more accurately reflect the criteria for selecting surrogate countries and producers and to publish the reasons for selecting surrogate producer(s) in individual dumping cases.

RECOMMENDATIONS TO THE CONGRESS

To improve the methods by which the foreign market value of a nonmarket economy producer's product is derived in dumping proceedings when actual prices or costs cannot be used, we recommend that the Congress amend the Tariff Act of 1930 (19 U.S.C. 1677b(c)) to make available in any dumping proceeding both

--the weighted average U.S. price of the lowest price market producer (including U.S. producers) selling in the United States (referred to as the U.S. market price approach described earlier) and

--the constructed value of the nonmarket economy producer's product based on valuing its actual factors of production at appropriate market economy prices (referred to as the simulated constructed value approach described earlier).

We are prepared to work with the appropriate committees of the Congress to devise legislative language for these recommendations.

AGENCY COMMENTS

The Departments of Commerce, Justice, and State agreed with our conclusion that actual nonmarket economy prices or costs should be used, when appropriate, in dumping cases. Commerce agrees with our recommendation that it should develop and publish the criteria for determining when such prices or costs can be used.

Justice and State raised the concern that the U.S. market price approach by itself does not allow a nonmarket economy producer to demonstrate comparative advantage. Consequently, Justice supports our additional recommendation that the simulated constructed value approach be retained to provide such an opportunity.

Commerce and Justice also agreed with our recommendation that Commerce regulations be amended to more accurately reflect the criteria used in selecting surrogate countries and producers.

CHAPTER 3

HOW TO APPLY COUNTERVAILING DUTY LAW TO PRODUCTS FROM NONMARKET ECONOMIES: DIFFICULT CHOICES REMAIN

Perhaps the most perplexing aspect of import trade administration vis-a-vis the nonmarket economy countries involves questions of subsidies and countervailing duties.

To date, the complexity of identifying and quantifying subsidies on goods from nonmarket economy countries has discouraged U.S. industries from requesting investigations of such subsidy practices. Recent developments could, however, result in a shift in the opposite direction. Provisions of the Trade Agreements Act of 1979 (19 U.S.C. 1671 et seq.) and the multilateral agreement on subsidies and countervailing measures (Subsidies Code) 1/ could result in the unintended curtailment of trade with nonmarket economy countries. The Commerce Department is considering how best to ensure that desired trade is not unnecessarily curtailed while still providing U.S. industries with the protection allowed them under the law.

The administrative and trade policy problems involved in trying to apply countervailing duty law to products of nonmarket economies and some of the options available are discussed following an overview of the legal setting.

MULTILATERAL SUBSIDIES CODE AND U.S. COUNTERVAILING DUTY LAW

The recently concluded Subsidies Code is intended to strengthen international discipline on the use of subsidies. Principally, the Code

--prohibits export subsidies on nonprimary and on certain primary products of developed countries;

--explicitly recognizes that domestic subsidies can distort international trade and requires signatories to work to avoid such distortions;

--provides for relief from domestic subsidies which distort international trade;

1/Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade (Subsidies/Countervailing Measures), Apr. 12, 1979, T.I.A.S. No. 9619.

--requires a government to explain a subsidy practice if requested;

--has less stringent subsidy rules for developing countries which become parties to the Code, with provisions for phasing in more stringent rules as their economies develop; and

--includes an illustrative list of export subsidies.

Article 15 of the Subsidies Code suggests a means for Code signatories to estimate subsidies when the nature of the exporter's economy does not permit direct measurement. The estimated subsidy would be derived using the value-simulating procedures used in calculating dumping margins on goods from nonmarket economies. That is, value would be derived as in dumping cases and the difference between that value and the producer's price in the signatory country would be assumed to be the result of a subsidy.

Under U.S. countervailing duty law, duties can be assessed to offset subsidies on products exported to the United States. In general, the two basic elements of a countervailing duty case under U.S. law are (1) identifying and quantifying the amount of a subsidy in an imported product and, (2) in some cases, determining whether the domestic industry has been injured by the subsidized imports.

The use of an injury test (i.e., an ITC decision as to whether subsidized imports are injuring a domestic industry) as part of countervailing duty proceedings is a relatively recent feature of U.S. law. Prior to 1975, U.S. countervailing duties could be applied only to dutiable imports and there was no requirement to prove injury to a domestic industry. U.S. law at that time deviated from the GATT, which stipulated that countervailing duties could not be imposed unless the subsidy practice in question caused or threatened to cause injury to a domestic industry or materially retarded establishment of a domestic industry. 1/ The Trade Act of 1974 extended the U.S. countervailing duty law to duty-free imports and provided for an injury test.

Section 701 of the Trade Agreements Act of 1979 (19 U.S.C. 1671) extended the benefit of an injury test in countervailing duty proceedings to all imports from countries considered to be under the Subsidies Agreement. Table 1 delineates the categories of injury test eligibility.

1/This variance of U.S. procedure from GATT rules was within the permitted exceptions to the GATT under a so-called grandfather clause because the U.S. law predated the GATT.

Limiting the need for an injury test, for the most part, to countries under the Agreement is intended to encourage countries to either sign the Subsidies Code or to assume substantially equivalent obligations. According to the State Department's comments on our draft report, however, "The selective extension of an injury test does not appear to have been a useful inducement to countries to sign the Subsidies Code or to assume equivalent obligations."

Table 1

Injury Test Distinctions
Under U.S. Countervailing Duty Law

Category of country	Imports eligible for an injury test	Nonmarket economies in each category
Country under the Agreement (note a)	All imports	None
Country not under the Agreement but for which injury test required by U.S. international obligations	Only duty free imports	Hungary Poland PRC Romania b/Yugoslavia
All other countries	No imports eligible	Albania Bulgaria Czechoslovakia GDR Soviet Union

a/Country under the Agreement is defined in Trade Agreements Act of 1979 as any country that

1. signs the GATT Subsidies Code and to which the United States applies the Code or that has not signed the Code but has assumed responsibilities substantially equivalent to the Code (as of May 1981, only Taiwan had such an agreement); or

2. has special provisions requiring unconditional MFN in trade agreements with the United States. (The only such agreements which could potentially qualify are those with El Salvador, Honduras, Liberia, Nepal, North Yemen, Paraguay, and Venezuela.)

b/Yugoslavia has signed the Code but has not yet ratified it.

Most, if not all, nonmarket economy countries would be unable to comply with all the provisions of the Code, because (1) according to various trade experts and government officials, the need to disclose information on certain aspects of the operation of their economies would be unacceptable and (2) their systems use domestic subsidies in the management of their economies in a way that makes identifying and quantifying the net effect of subsidies generally impossible. Therefore, because most nonmarket economy countries will have difficulty signing the Code, the provisions of the Trade Agreements Act of 1979 present an inescapable penalty (no extension of an injury test) rather than an incentive to sign and comply with the Subsidies Code.

ALLOWING ESTIMATES OF SUBSIDIES WITHOUT REQUIRING AN INJURY TEST COULD PRESENT A PROBLEM

The use of the methodology suggested by Article 15 of the Subsidies Code for calculating countervailable subsidies, coupled with no requirement for an injury test in most cases, could have serious consequences for U.S. importers of goods from nonmarket economies.

The Commerce Department, which administers the countervailing duty statute, is currently considering its options for applying this law to imports from nonmarket economies. If Commerce decides to allow the outcome of dumping-type simulations to be used as evidence of a countervailable subsidy, the processing of antidumping and countervailing duty petitions involving dutiable (and in most cases duty-free) goods from the nonmarket economies would be the same except for the need to determine injury to a domestic industry--a requirement in dumping but not in countervailing duty cases. Logically, this would result in domestic petitioners filing for relief under the countervailing duty provisions rather than under antidumping provisions because the imposition of duties would be easier to obtain.

The following example involving carbon steel plate imports from Poland illustrates how this could work.

> In 1978 and 1979, import prices of carbon steel plate from Poland were the subject of a dumping investigation. Since Poland was determined to be a state-controlled economy within the meaning of the antidumping statute, the case analysts selected Spanish steel prices to simulate what Polish prices might have been had Poland's carbon steel plate producers been operating in a market environment. Comparing Spanish domestic carbon steel plate prices with Polish export prices to the United States, weighted average dumping margins of 8.53 percent were found for a majority of the imports. The ITC, however, subsequently ruled that the domestic carbon steel plate industry was neither being injured nor likely

to be injured by the imports (primarily because the Polish imports were only 1.4 percent of U.S. consumption) and no duties were imposed.

A countervailing duty investigation of the Polish carbon steel plate imports (using the Article 15 subsidy-estimating method) would have resulted in a finding of a subsidy and an 8.53 percent countervailing duty would have been imposed. The lack of injury would have been immaterial. This outcome would have reduced competition without direct evidence of either injury or a countervailable subsidy and might have precluded further imports of Polish carbon steel plate.

The likelihood of such outcomes could inhibit trade with countries with which the United States wants to trade because the potential for price competition will be limited by the threat of countervailing duties. Also, Commerce's workload could reasonably be expected to grow due to the enhanced prospects for successfully imposing countervailing duties on products from countries ineligible for injury tests.

WAYS TO ADDRESS THE POSSIBLE PROBLEM OF ESTIMATING SUBSIDIES WITHOUT REQUIRING AN INJURY TEST

There are ways to mitigate the possible consequences of using Article 15 subsidy measurements in countervailing duty cases involving imports from countries ineligible for injury tests. The Commerce Department could choose not to use Article 15-authorized estimates of subsidies, thereby avoiding the possible consequences outlined above. This would, however, mean that nonmarket economy subsidies would have to be actually quantified before countervailing duties would be imposed, which would continue the limited likelihood that countervailing duty petitions involving products from nonmarket economies could be successfully concluded.

Identifying and quantifying subsidies is very difficult in any circumstance. When nonmarket economies are involved, the difficulty is greater.

Two critical aspects of analyzing subsidy practices are access to information setting forth the subsidy amounts and the existence of a suitable exchange rate for converting subsidy amounts stated in foreign currencies into U.S. dollars. For the most part, this would be impossible to do for products from nonmarket economies. In addition to the complex intertwining of subsidies and taxes, the closed nature of nonmarket countries' political and economic systems makes it difficult to obtain data on financial institutions and individual enterprises. Systematic reporting of financial transactions between nonmarket economy governments and enterprises is sparse. Also, the nonmarket economy countries maintain multiple foreign exchange rates for their

domestic currencies, none of which are based on market considerations. This is further complicated by the use of generally unknown currency conversion coefficients for calculating how much domestic currency an enterprise will receive for convertible currencies earned through foreign trade transactions. Consequently, there is no obvious way to translate amounts stated in these currencies into U.S. dollars.

The Commerce Department, however, is exploring ways to increase its ability to evaluate subsidy practices of nonmarket economy countries. The outcome of its work (as yet incomplete), coupled with changes in some of the nonmarket economic systems, could increase at least slightly the possibility of identifying and quantifying actual subsidy practices.

Although, in general, the nonmarket economy countries are not moving away from central economic planning toward domestic market environments, a few are evolving in ways which facilitate identifying and quantifying subsidies. Data on financial transactions are occasionally discussed in certain industry trade journals and other publicly available sources. Thus, the potential exists for the occasional examination of nonmarket economy subsidy practices. Also, a few nonmarket economy countries are moving toward a single, market-type exchange rate which would enable amounts stated in one currency to be valued in such currencies as the dollar. This is already possible for the Yugoslav dinar, and, according to banking industry representatives, the Hungarian forint will probably evolve to a single market-type exchange rate sometime during the mid-1980s. Romania, as a member of the International Monetary Fund, is committed to eliminating the multiple exchange rate system of its domestic currency.

For the other nonmarket economies, an option would be to calculate a purchasing power equivalent for their domestic currencies in terms of a freely usable currency. While this may be technically possible, such efforts face their own set of problems. For instance, nonmarket economy governments would be unlikely to provide or continue to provide requisite data if the results might be used in countervailing duty investigations.

The practical effect of these problems is that actually identifying and quantifying subsidies remains only remotely possible. Injured domestic industries would have to rely on antidumping laws to obtain relief from unfairly priced imports.

A second approach to dealing with nonmarket economy countervailing duty cases could entail concluding bilateral agreements with those countries that do not sign the Subsidies Code. Under this approach, nonmarket economy governments would assure their conformance to the Code's principles to the extent feasible; at a minimum, they would assure that they would not grant export subsidies and would consider the possible injurious effects on trading partners when granting domestic subsidies. In exchange, the

United States would consider these assurances adequate to meet the requirements of the Trade Agreements Act of 1979, thus extending the benefit of an injury test.

Such agreements would preclude those countries which are able to comply generally with the Code's principal intent but which cannot sign the Code from facing a penalty of no injury test under U.S. countervailing duty law. Thus, a potential deterrent to trade with countries with which the United States wishes to trade could be removed and the intent of the Subsidies Code and the Trade Agreements Act of 1979 pertaining to the Code could be achieved to the extent feasible.

A major drawback to this approach, however, is that this action would establish a group of countries (the nonmarket economy countries) which would be given the benefit of an injury test under domestic U.S. law under less rigorous requirements than those applied to other countries. This would provide an advantage to nonmarket economies which the United States does not extend to more traditional trading partners. According to the Office of the USTR, this action would be questionable on policy grounds and would also likely constitute a violation of the MFN principle of Article I of the GATT, at least with respect to those nonmarket economy countries which are GATT signatories.

CONCLUSIONS

The nonmarket economies pose perplexing problems for the United States as it strives to achieve through its laws and the GATT greater discipline in the use of subsidies which distort international trade. Allowing estimates of subsidies as suggested by Article 15 while not requiring in most cases an injury test in countervailing duty cases could be anticompetitive and reduce trade with nonmarket economy countries with which the United States wishes to trade. However, the alternatives also have drawbacks as discussed in this chapter.

We make no recommendations in this chapter because potential solutions to the problem outlined above--for example, concluding bilateral agreements--could have trade policy consequences affecting other than just the nonmarket economy countries. Our discussion is intended to provide the Congress with an understanding of the problem as it seeks solutions and assesses executive branch actions.

CHAPTER 4

SECTION 406: SPECIAL PROVISIONS FOR TRADE WITH COMMUNIST COUNTRIES

Section 406 of the Trade Act of 1974 (19 U.S.C. 2436) is intended to provide an additional means of protection in the event that imports from a Communist country 1/ disrupt domestic markets. In practice, however, no relief has been granted under section 406, and some agencies and U.S. businesses claim that it may be discouraging trade by adding uncertainty to trade relationships. If the Congress in its deliberations determines that section 406 is discouraging desired trade with Communist countries, it could amend the section without significantly increasing the risks to U.S. industries.

STRUCTURE AND USE OF SECTION 406

Section 406, also referred to as the market disruption provision, authorizes the President to impose remedies (e.g., quotas) to counter the effects of imports from Communist countries that injure U.S. industries. As defined by law:

> "Market disruption exists within a domestic industry whenever imports of an article, like or directly competitive with an article produced by such domestic industry, are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat thereof, to such domestic industry."

Generally, the section 406 relief process would involve the following steps.

1. A domestic entity (trade association, firm, union, or group of workers) petitions the ITC alleging that rapidly increasing imports from a Communist country have been a "significant cause" of "material injury." 2/

2. The ITC has 90 days within which to hold hearings, determine whether U.S. markets have been disrupted, and report its findings to the President.

1/Section 406 applies specifically to "Communist" countries, and therefore we use that term in this chapter.

2/Section 406 investigations may also be initiated by the ITC, the President, the USTR, or by resolution of either the House Ways and Means or Senate Finance Committees.

3. If the ITC does find that market disruption has occurred, its report to the President will include recommendations on actions to prevent or remedy the disruption. 1/

4. The President has 60 days in which to decide whether to grant relief, and, if granted, what it will be.

5. If the President does not follow the ITC's recommended action, Congress may override his decision and require that the recommendation be implemented.

Since the Trade Act of 1974 went into effect, relief from market disruption has been sought under section 406 six times, as detailed in table 2.

Table 2

Case	Date filed	Product and country	ITC injury decision vote
ta-406-1	Dec. 15, 1977	work gloves/PRC	4 to 2 for no disruption
ta-406-2	May 3, 1978	clothespins/PRC	a/6 to 0 for disruption
ta-406-3	May 3, 1978	clothespins/Poland	5 to 1 for no disruption
ta-406-4	May 3, 1978	clothespins/Romania	6 to 0 for no disruption
ta-406-5	July 18, 1979	ammonia/Soviet Union	b/3 to 2 for disruption
ta-406-6	Jan. 18, 1980	ammonia/Soviet Union	c/3 to 2 for no disruption

a/The President declined to grant relief pending the outcome of an ITC-initiated investigation under section 201 of the effects of imports of clothespins from all sources.

b/On December 11, 1979, the President decided not to grant relief on the grounds that domestic market conditions were good and that lower imports from the Soviet Union would result in a shift to other foreign suppliers rather than to increased domestic production.

c/Initiated by the President on January 18, 1980, (after the Soviet invasion of Afghanistan) on the basis of changed economic events and reasonable grounds that market disruption existed regarding such imports.

1/The ITC can recommend a duty increase, a quota, a combination of duty plus quota, or some other form of import restriction (i.e., an orderly marketing agreement).

AMENDING SECTION 406: RISKS WOULD NOT SIGNIFICANTLY INCREASE

We believe that exempting some countries from coverage under section 406 (based upon economic and/or political risk assessments) would not significantly increase the risk of disruption because the concerns that triggered enactment of section 406 have not materialized and other U.S. laws provide essentially the same protection.

Concerns have not materialized

In the 3 years before the Trade Act of 1974 was enacted, the United States pursued a number of bilateral trade negotiations with the Soviet Union which could have led to the extension of MFN treatment to that country. The Congress was concerned at the time as to the trustworthiness of the Soviet Union as a trading partner.

One principal concern was the capability of closed political/economic systems of the Soviet type to purposefully target disruptive export volumes in short time periods with potential economic and national security consequences. That concern, coupled with an acknowledgment of the difficulties in applying traditional unfair trade practice remedies to nonmarket economy goods, led to the enactment of section 406. Although the possibility that imports from the Communist countries could threaten national security was discussed in the Senate Finance Committee report that accompanied the Trade Act of 1974, this concern was not reflected in the language of the statute. (Section 232 of the Trade Expansion Act of 1962 already provided a means for dealing with risks to national security stemming from imports.)

The kinds of import surges envisioned by the Congress have not materialized. Relief has been sought only six times, involving three products, and none of these cases resulted in the granting of relief to domestic industries. 1/ (See table 2.)

The limited number of petitions for section 406 relief and the infrequency of affirmative injury determinations do not indicate that U.S. markets have been "flooded" by imports from Communist countries. The actual ability of these countries to do so must be evaluated in the light of their economic systems and motivations. Commercial enterprise representatives of some of the Eastern European countries have pointed out that such

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1/The President did exercise section 406 emergency authority to restrict Soviet anhydrous ammonia shipments, which was terminated following ITC's determination that the domestic industry was not injured.

concerns overestimate the ability of their governments' economic apparatus to redirect materials and other resources in a concerted effort to disrupt U.S. markets. In addition, some countries, notably Yugoslavia (and to a lesser degree Hungary), have been decentralizing controls over commercial enterprises, thereby lessening direct government control over production levels of specific items. Officials of nonmarket countries also pointed out that they are interested in establishing long-term economic relationships and, therefore, would be unlikely to jeopardize that goal by deliberately disrupting U.S. markets. This does not mean, however, that the original concerns that prompted section 406 can be totally dismissed.

There was congressional concern that existing antidumping laws did not provide sufficient protection from unfairly priced, injurious imports from the nonmarket economy countries. Although the antidumping provisions have proved cumbersome when applied to imports from nonmarket economies, relief has been obtained through their use. Concern over the effectiveness of unfair trade measures could, moreover, be further reduced through adopting the proposals outlined in chapters 2 and 5.

Protection available in other forms

Sections 201-203 of the Trade Act of 1974 (the principal import relief provisions of U.S. law) can provide U.S. industries with essentially the same protection as section 406.

A comparison of the provisions of section 406 with those of section 201 in table 3 implies greater differences between the relief mechanisms than our analysis shows.

Table 3

Comparison of sections 201 and 406

Provisions	Section 201	Section 406
ITC investigation timeframe	6 months	3 months
Presidential decision timeframe	60 days	60 days
Injury test	substantial cause of serious injury	significant cause of material injury
Import pattern	increasing imports	rapidly increasing imports
Import sources	all sources	imports from Communist countries
Remedy	generally applicable to all import sources	applicable to Communist countries subject to investigation
Emergency action	none	Presidential emergency action possible

Petitions under section 406 must be processed faster than those under section 201 and section 406 provides for emergency action by the President. Despite these differences, opportunities for relief are not substantially improved under section 406.

Section 406 requires that imports from a Communist country must be shown to be a significant cause of material injury to the U.S. producer of a like or similar product before relief can be recommended to the President. If the ITC, through analysis of such factors as employment, profits, capacity utilization, and inventory levels, finds that the industry has been materially injured, it must then determine whether the imports were a significant cause of that injury. Although the degree of injury required by section 406 is less than under section 201, a recommendation for relief is not very likely. Based on the 406 cases to date, an industry would not be found to be injured unless the Communist supplier(s) was determined to be the primary source of the imports.

Another perceived advantage of section 406 over section 201 is the ability to discriminately focus the remedy on the causes of the injury--the Communist supplier(s) involved--while allowing sources in market economies to continue exports to the United

States. In fact, however, relief is narrowly focused under section 201 when quotas are part of the remedy because quotas are allocated to specific countries on the basis of historic sales levels. Therefore, those countries whose exports to the United States have increased the most during the period under investigation would be more affected than other sources. In addition, the perceived advantage of narrowly focused relief has proved to be a disadvantage of section 406 because other sources would be able to increase exports in place of restricted Communist sources; this could not happen under section 201.

In both section 406 cases in table 2 where injury was found, the President rejected relief, emphasizing that the proposed remedy could have resulted in the affected imports being replaced by imports from other foreign sources. 1/

PRIVATE SECTOR VIEWS OF THE TRADE IMPACT OF SECTION 406

Section 406 has been little used and has yet to cause formal import restrictions, but the publicity given the recent anhydrous ammonia cases has heightened importers' awareness of its potential disruptive effects on commercial relationships. Trade law attorneys told us they would not ignore these possible effects when advising clients considering countertrade or buy-back arrangements.

A representative of a company currently engaged in trading relationships and commercial negotiations with nonmarket economy countries advised us that:

> "* * * it is clear that before entering into any long-term contracts with Communist nations, we and the governments with which we are negotiating will have to weigh seriously the possibility that a future action under Section 406--no matter how unjustified on the merits--might disrupt or even totally frustrate the agreement. The deterrent effect which Section 406 may thus eventually have on East-West trade should be seriously considered * * *."

Representatives of other U.S.companies told us that they believe their ability to compete for sales in Eastern Europe (involving some amount of buy-back or countertrade) is impaired as a consequence of the potentially disruptive effects of section 406. Their perception is that their potential Eastern European customers, other things being equal, view section 406

1/The ITC recognized the practical limit to the usefulness of section 406 when it initiated an investigation of clothespins from all sources under section 201. Injury was found and relief (quotas) from all sources was granted by the President for a 3-year period.

as a potential impediment to the U.S. firms' ability to carry out the terms of any agreement(s). These assertions are impossible to verify or refute and we did not attempt to determine the specific effect of section 406 on trade. We believe, however, that these concerns are reasonable and would logically be considered when evaluating potential business arrangements.

POSSIBLE WAYS TO AMEND SECTION 406

If the Congress in its deliberations determines that section 406 is discouraging desired trade with Communist countries, the section could be amended. For example, the section could be amended to permit some Communist countries to be exempted from its coverage without significantly increasing the risk to U.S. producers.

One way to make such transitions would be to recognize that relations with Communist countries inevitably have a high political content and, therefore, authorize the President, in consultation with Congress, to merge political and economic considerations and decide which countries would be covered by section 406. Another way would be to remove countries from coverage on the basis of assessments of the economic risks. Economic criteria would need to be developed and should be as objective as is reasonably possible. Developing the exact criteria to be used would require further study, but might include the countries'

--extent of participation in international trade and financial organizations, such as GATT and the International Monetary Fund;

--degree to which they have been reliable trade partners over time (including whether their exports have disrupted U.S. markets in the past);

--degree of transparency in operation of their economies;

--degree of transparency in preparation and approval of their national budgets; and

--extent to which their pricing systems reflect supply and demand.

Again, the President in consultation with Congress, would determine which countries would be exempted from (and if necessary brought back under) section 406 coverage.

AGENCY COMMENTS

The ITC agrees that there have been few cases under section 406 but disagrees that the paucity of cases necessarily demonstrates the ineffectiveness or irrelevance of the statute. It believes the infrequency of complaints may very possibly

indicate the success, not the failure, of section 406 in that the existence of the section may have discouraged potentially disruptive imports or directed trade into nondisruptive areas.

The Office of the USTR agrees that the fears which led to the enactment of section 406 have not materialized, and that it should be amended.

The Justice Department notes that the mere existence of section 406 can have a disruptive effect on trade by adding to the uncertainty and risk businessmen must face when considering commercial agreements with nonmarket economies. Although Justice believes amending section 406 would be a step in the right direction, it recommends that the need for section 406 at all be given close scrutiny.

CHAPTER 5

WAYS TO ANTICIPATE OR EXPEDITIOUSLY RESOLVE TRADE DISPUTES

The U.S. Government has worked to establish a legal and administrative framework within which to pursue its general trade objectives with appropriate safeguards. That framework incorporates mechanisms for monitoring trade, identifying and discussing trade problems, and resolving trade disputes expeditiously.

The executive branch can use such methods as trade monitoring systems, bilateral trade agreements and commissions, and consultations and negotiated settlements to try to

--improve trade relations with nonmarket economy countries through constructive discussions of potential or developing problems;

--minimize trade disruptions; and

--avoid or expedite administrative proceedings such as dumping or countervailing duty cases that are costly and unpredictable in outcome.

TRADE MONITORING REQUIREMENTS

Congress demonstrated its belief in the value of trade monitoring systems for identifying import problems when enacting the Trade Act of 1974 and placed particular emphasis on the need to scrutinize trade with nonmarket economies. 1/ Section 410 of the Trade Act (19 U.S.C. 2440) requires a system to specifically monitor and report on trade with nonmarket economies, and section 411 requires that periodic reports be issued on the status of East-West trade.

As required by section 410, the ITC has issued quarterly reports on trade between the United States and nonmarket economy countries, and these reports generally conform to statutory requirements. Each report includes trade statistics based on data provided by the Department of Commerce, a summary of major trade developments for that quarter, and information on the effect of various nonmarket economy imports on U.S. domestic production and employment.

1/The Trade Act also provides for a general monitoring system; section 282 (19 U.S.C. 2393) directs the Secretaries of Labor and Commerce to develop jointly a program to monitor the relationship between import volume and changes in domestic production and employment.

The report required by section 411 (19 U.S.C. 2441 note) was discontinued in April 1978, when the East-West Foreign Trade Board 1/ ceased publishing it. Publication of the section 411 report was, however, resumed in the summer of 1981.

During the period when no section 411 report was issued, the ITC expanded the scope of its section 410 report to include most of the section 411 statutory requirements. These reports routinely include discussions, where appropriate, on the status of bilateral trade negotiations, activities of the trade commissions, and any outstanding trade dispute cases under consideration by the ITC or Commerce.

AGENCY COMMENTS AND OUR EVALUATION

In view of the 3-year period during which no section 411 report was issued, we proposed in our draft report that the section 410 and 411 reporting requirements be consolidated into one report prepared by the ITC. The ITC suggested that, should a separate 411 report be eliminated, only those requirements based on factual analysis should be reassigned to the Commission; it would be inappropriate for the Commission to make policy recommendations concerning the promotion of East-West trade.

The Office of the USTR informed us that it had initiated preparation of the section 411 report and expected the first report to be issued by the President in summer 1981. It believes that two separate reports should continue to be issued and, consequently, disagreed with our proposal to transfer section 411 report responsibilities to the ITC. According to the Office of the USTR, the ITC, as an independent investigatory body, is not in a position to report on East-West trade policy.

In view of the Office of the USTR's action we are not recommending that the section 410 and 411 requirements be consolidated at this time. However, we had no opportunity to review the draft section 411 report and believe that the issue of report consolidation should be further considered. At a minimum, the Office of the USTR and the ITC should coordinate their reports to avoid duplication and the Office of the USTR stated that it plans to do so.

1/ An interagency body which had responsibility for the section 411 report until January 1980; at that time the trade reorganization plan abolished the Board and responsibility for the report was transferred to the President (19 U.S.C. 2171 note).

BILATERAL COMMISSIONS NOT DESIGNED TO SETTLE SPECIFIC DISPUTES

The U.S. Government has established bilateral trade commissions with the Governments of Hungary, Poland, the PRC, Romania, and the Soviet Union to

--promote economic cooperation and understanding;

--provide for exchange of views on commercial and economic relations;

--identify and attempt to recommend solutions to trade problems; and

--improve opportunities for exchanging information in the areas of commercial, industrial, and technological cooperation.

The commissions have been useful in pursuing these broad goals but cannot realistically be expected to have much impact in resolving specific trade disputes because they meet infrequently, are composed of policy-level representatives, and cannot abridge U.S. administrative proceedings such as dumping or countervailing duty investigations. We believe, however, that these commissions should continue to deal with anticipated problems and continue their educational function by presenting and explaining U.S. laws and regulations to nonmarket trading partners of the United States.

CONSULTATIONS AS A MEANS OF DEALING WITH MARKET DISRUPTIONS

Consultations afford trade partners the opportunity to discuss trade problems and reach mutually acceptable solutions short of relying on administrative remedies and thereby can benefit all interested parties. Consultations are sanctioned and encouraged by both U.S. and international trade law and, in a number of ways, have been built into the framework of U.S.-nonmarket economy relationships.

The GATT contains numerous references to consultations as an appropriate means of resolving trade problems. GATT articles XII and XXII prescribe the use of consultations, and the protocols of accession to the GATT of Hungary, Poland, and Romania recognize the principle of consultations in dealing with market disruptions.

U.S. law also acknowledges the desirability of consultations as a means of dealing with market disruption vis-a-vis the nonmarket economies. Section 406 of the Trade Act of 1974, enacted to safeguard against market disruption to domestic industries caused by imports from Communist countries (see ch. 4), authorizes the President to initiate consultations with the country involved when he has determined that there are "reasonable grounds" to believe that market disruption exists. Section 405,

(19 U.S.C.2435), which establishes the parameters for bilateral commercial agreements extending MFN to nonmarket economies, requires that these agreements "include safeguard arrangements (A) providing for prompt consultations whenever either actual or prospective imports cause or threaten to cause, or significantly contribute to, market disruption * * *."

Consequently, bilateral trade agreements negotiated between the United States and Hungary, Romania, and the PRC have all incorporated language on the use of consultations. The U.S. agreements with Hungary and Romania both contain clauses in which the parties agree to "consult promptly" in cases of market disruption and set forth specific procedures to be followed when consultations are invoked. The U.S.-PRC agreement, in much more general terms, stipulates that:

> "the Contracting Parties shall exchange information on any problems that may arise from their bilateral trade, and shall promptly hold friendly consultations to seek mutually satisfactory solutions to such problems. No action shall be taken by either Contracting Party before such consultations are held." 1/

For Poland, which was granted unconditional MFN status by the United States prior to enactment of the Trade Act of 1974, the principle of consultations was addressed within the framework of the Joint American-Polish Trade Commission. During the second session, Commission representatives:

> "Made reference and reaffirmed their adherence, to their respective obligations under the General Agreement on Tariffs and Trade * * * to consult with each other to develop mutually acceptable solutions in the event of imports which cause, threaten or contribute to dumping or disruption of domestic markets."

Petitions for market disruption consultations

Section 406 of the Trade Act of 1974 provides a mechanism for domestic entities to petition the President to initiate consultations when such consultations have been provided for under the bilateral agreements concluded under the authority granted by section 405. To date, no formal industry petitions requesting such consultations have been filed nor have criteria been developed or published to guide prospective petitioners in judging when a petition would be appropriate and in preparing such a petition.

1/In exceptional cases, either party may take provisional action, followed immediately by consultations.

CONCLUSIONS AND RECOMMENDATION

There have been few petitions for relief from market disruption under section 406, as cited in chapter 4; we believe nevertheless that the potential usefulness of the formal consultative process is diminished because no criteria for accepting petitions have been developed or published.

Consequently, to better ensure that the intent of section 406(d) is achieved, we recommend that the USTR, as the chief trade negotiator for the United States and the official who would likely be responsible for consultations, develop for Presidential approval and publication criteria for accepting petitions for consultations under section 406.

We had also proposed in our draft report that the Congress consider modifying section 406 to authorize the President to accept petitions for consultations with all countries covered under section 406 rather than just those with whom the United States has concluded bilateral agreements. Given the lack of formal petitions to date, however, we believe that at this time it would be appropriate to first establish and assess the effectiveness of the petition criteria before expanding authority to accept petitions.

AGENCY COMMENTS

The Office of the USTR stated that it does not believe a formal petitioning process is necessary to ensure use of the consultative mechanism included in U.S. bilateral trade agreements with nonmarket economy countries. Under these agreements with Romania, Hungary, and the PRC, the U.S. Government has the right to prompt consultations whenever actual or prospective imports cause or threaten to cause market disruption. The Office of the USTR also pointed out that the U.S. Government can and does informally consult with these foreign governments on a wide variety of trade issues; in addition, interested parties may take advantage of other provisions of U.S.law to ensure that the consultative mechanism is used in cases in which it is believed that a provision of a bilateral agreement has been breached. Accordingly, the Office of the USTR believes that the establishment of additional detailed procedures to request initiation of consultations is an unnecessary and cumbersome administrative process.

Despite USTR's comments, we still believe that, to better ensure that the intent of section 406(d) is achieved (to encourage consultations as a way to resolve trade disputes), criteria should be developed and published for accepting petitions for consultations.

SETTLEMENTS: CHANGES NEEDED TO MAKE THEM USABLE IN DUMPING CASES

The Trade Agreements Act of 1979 amended the Tariff Act of 1930 to establish provisions for suspending dumping investigations before their completion by settling the cases through other means. These settlement provisions are narrowly defined and are not intended as a substitute for normal dumping proceedings. 1/ Indeed, the Senate Finance Committee report accompanying the Trade Agreements Act noted that actions to suspend investigations were to be considered "unusual" and not a normal means of disposing of dumping cases. Use of settlement proceedings in cases where nonmarket economies are involved, however, is particularly constrained, and it is doubtful whether some of the authorized settlement mechanisms could be employed vis-a-vis nonmarket economy imports. Consequently, we believe more workable settlement procedures should be devised for use in nonmarket dumping cases.

Settlements: purpose and methods

Settlements are intended to provide a more rapid and pragmatic resolution to dumping cases. Under the Tariff Act of 1930, as amended, a dumping investigation may be:

1. Terminated if the petitioner withdraws the petition. 2/

2. Suspended if the exporters accounting for substantially all of the merchandise subject to the investigation agree to cease exports of the merchandise to the United States within 6 months of the suspension date. 3/

1/Currently authorized procedures for settling countervailing duty investigations are similarly constrained, but it is difficult to assess their application vis-a-vis nonmarket economies because they rest principally on the ability tc quantify a subsidy in order to eliminate or offset it. Consequently, the question of whether existing settlement procedures can be used in nonmarket economy countervailing duty cases cannot be adequately addressed until the basic issue of how to quantify a subsidy in a nonmarket economy is resolved. (See ch. 3.)

2/The ITC may not terminate an investigation until the administering authority has made a preliminary determination as to whether there is a reasonable basis to believe or suspect that merchandise is or is likely to be sold at less than fair value.

3/An agreement can be accepted only if provision is made to control the amount of exports during the interim period and the administering authority is satisfied that the agreement serves the public interest and can be effectively monitored.

3. Suspended if these same exporters agree to revise their prices to eliminate completely any amount by which the foreign market value of the subject merchandise exceeds the price at which these exporters sell it in the United States. 1/

4. Suspended upon receipt of an agreement from the exporters to revise prices, if the administering authority believes extraordinary circumstances exist and if the agreement will eliminate completely the injurious effect of exports to the United States of that merchandise. 1/ In addition, (a) the price levels of domestic products must be prevented from being suppressed or undercut by imports and (b) exporters must agree to revise prices to within a calculated amount of foreign market value. 2/

Existing law incorporates a number of safeguards to ensure that settlements are not abused. Dumping investigations generally cannot be suspended unless

--the public interest is served;

--effective monitoring of suspension agreements is practicable;

--domestic petitioners are notified and consulted on the terms of proposed settlements;

--all parties to the investigation have an opportunity to comment on proposed suspension agreements;

--parties to the investigation may request continuation of the full investigative proceedings; and

--those intentionally violating agreements will be subject to civil penalties.

1/Agreements can be accepted only if the administering authority is satisfied that the agreements serve the public interest and effective monitoring by the United States is practicable.

2/The formula in the law provides that "for each entry of each exporter the amount by which the estimated foreign market value exceeds the United States price will not exceed 15 percent of the weighted average amount by which the estimated foreign market value exceeded the United States price for all less-than-fair-value entries of the exporter examined during the course of the investigation."

Difficulties in applying settlement procedures in nonmarket economy cases

To date, no dumping investigations involving nonmarket economy products have been suspended, and it is in fact doubtful whether some of the authorized settlement mechanisms could be successfully employed in cases involving imports from nonmarket economies. We believe that, given the level of complexity and uncertainty that often accompany investigations involving such imports, more workable settlement procedures should be devised.

One procedure authorized for suspending a dumping investigation--cessation of exports--poses no difficulties in cases involving nonmarket economies. The other two procedures--eliminating sales at less than fair value or eliminating injurious effect--do present problems. Current antidumping law requires that, should the economy of the exporting country be "State-controlled to an extent" that normal foreign market value calculations cannot be used, then foreign market value will be determined on the basis of either prices or constructed value of the subject merchandise in a non-state-controlled economy. When reviewed in the context of the settlement procedures, this means that nonmarket economy exporters would be asked to adjust their prices based on another producer's prices over which they have no control or foreknowledge.

For example, the law provides, as one condition of an agreement to eliminate injury, a commitment by exporters to revise the price of their export goods to the United States to within a calculated amount of the estimated foreign market value (e.g., the exporters' sales prices in their home market) assigned those goods. In simplified terms, the formula 1/ for determining acceptable prices to the U.S. market works as in the following hypothetical example. Assume the Commerce Department develops the following values for a product imported at less than fair value from Country A:

Country A's price to the United States	Estimated foreign market value of Country A's product
$15.00	$25.00

In this example, the estimated foreign market value exceeds the price of Country A's goods in the U.S. market by $10.00; 15 percent of that difference equals $1.50. Therefore, should an agreement to revise prices be concluded, Country A's sales price to the United States would have to be within $1.50 of the continuing calculations of estimated foreign market value.

1/See footnote 2 on p. 48 for the formula provided in law.

The agreement may well be workable if Country A is a market economy. In that case, ongoing calculations of foreign market value would normally be based on the prices charged by Country A in its home market--the Country A parties to the agreement have control over prices charged in their home market and therefore could adjust to stay within the $1.50 range.

When Country A is a nonmarket (or state-controlled) economy within the meaning of the statute, however, home market prices of Country A would not be used as the basis for calculating foreign market value. Instead, prices of a surrogate market economy country would be chosen or, as a last resort, a constructed value would be determined. In either case, Country A has no control over such prices or values. Should nonmarket economy Country A attempt, as per an agreement, to keep its sales price to the U.S. market within $1.50 of the foreign market value assigned to its goods, it might well find itself unwittingly violating the agreement when the surrogate producer in some other country alters its prices. It is unlikely that either the Commerce Department, tasked with approving and monitoring such agreements, or nonmarket economy countries would favor an agreement fraught with such uncertainty. Commerce officials, in fact, have advised us that the statutory language of this settlement approach would render it inapplicable to nonmarket economies; various trade lawyers have also advised us that generally they would be reluctant to counsel nonmarket economy clients to agree to such settlements.

Proposed methods for settling nonmarket economy dumping cases

Given the problems in employing existing settlement procedures, we believe that settlement methods should be devised that can be used in cases involving nonmarket economies. Inherent in these methods are the premises that (1) settlements should be linked to a finding of injury; in the absence of such an injury determination, there is a real risk of unnecessarily curtailing trade, hurting legitimate competition, and jeopardizing the interests of consumers, (2) proposed settlement agreements should be published to allow for public comments, (3) the settlements process should include adequate representation of the domestic industry and public interests, and (4) the administering authority (currently the Commerce Department) should make a public interest determination on the proposed settlement which would address competitive concerns.

Adoption of either of the two settlement options outlined below would require amendments to current legislation. We believe, however, that these options should, to the extent possible, conform to the existing procedures for settling dumping cases.

Option 1: adjusting prices to eliminate less than fair value sales

This option for settling nonmarket economy dumping cases (when third-party prices or costs are used to establish foreign market value) would provide for undertakings based on an adjusted price, thereby giving a nonmarket economy a reasonable means of adhering to the terms of a settlement agreement. Under this option:

1. The dumping petition is filed with the ITC and the administering authority.

2. If the ITC finds preliminary injury, the administering authority estimates foreign market value using existing calculation methods or those methods we recommend in chapter 2. (See p. 26.)

3. Using the estimated foreign market value as a benchmark, the administering authority develops a price to eliminate the margin for a specified period of time. That price, which could be adjusted by such factors as inflation, market trends, etc., would then not be affected by subsequent changes in the foreign market value for the life of the settlement agreement, which would remain in force for a finite period and be subject to periodic review.

4. As under current law (a) the settlement agreement must be deemed to be in the public interest, (b) monitoring of the agreement must be practicable, (c) petitioner and respondent must be afforded ample opportunity to comment on the proposed settlement, and (d) petitioner or respondent can require continuation of the full dumping proceedings.

Option 2: eliminating injury

This settlement option focuses on eliminating injury while, to the extent possible, avoiding existing arbitrary calculations of foreign market value and would include the following basic steps.

1. The ITC follows current procedures in making a preliminary injury determination.

2. If the ITC finds preliminary injury and the administering authority finds that there is a strong presumption of an unfair pricing practice, two administrative processes begin concurrently: the ITC transitions into final

injury determination proceedings and the administering authority begins an investigation to determine adjustments to the U.S. import price that might remove the injury. In pursuing its investigation, the administering authority is obligated to consult severally with the petitioner and respondent on possible remedies.

3. The administering authority, based on judgments that the settlements would be administrable and acceptable to the parties involved, provides suggested settlements to the ITC, which would determine whether such settlements would relieve injury to the domestic industry. The administering authority, on the basis of advice from the ITC, develops the settlement agreement which would remain in force for a finite period and be subject to periodic review.

4. The terms of the proposed settlement would be published in the Federal Register and become subject to public comments. In devising the settlement, the administering authority would be responsible for making a public interest determination with respect to the agreement, which would address competitive concerns.

5. Should the administering authority be unable to develop acceptable settlement recommendations, or the ITC be unable to rule on the effectiveness of a settlement to relieve injury, or either of the parties to the investigation request it, the case would revert to the administering authority and the ITC for normal processing as a standard dumping investigation. The reasons for such a decision should be fully explained in the Federal Register.

CONCLUSIONS AND RECOMMENDATION TO THE CONGRESS

Some of the settlement procedures now crafted into dumping proceedings pose special difficulties when applied to nonmarket economies. The Trade Agreements Act of 1979 recognizes the legitimacy of settlements, albeit within a limited framework and with numerous safeguards. For nonmarket economies, however, two of the opportunities for settlement appear impracticable, with little opportunity for the nonmarket economy exporter to settle in good faith. We believe other approaches for settling cases involving nonmarket economies should be considered.

Therefore, we recommend that the Congress amend the Tariff Act of 1930 to include additional provisions for settling nonmarket economy dumping cases, as outlined on pages 51 and 52.

We are prepared to work with the appropriate committees of the Congress to devise legislative language for these recommendations.

DEPARTMENT OF JUSTICE COMMENTS AND OUR EVALUATION

The Department of Justice believes that our first settlement option--development of an adjusted price to eliminate sales at less than fair value--would be "attractive" if opportunity is provided for public comment and if the nonmarket economy respondent is allowed to require continuation of the dumping proceeding. We agree with these principles and have incorporated them in the option as presented.

Justice is concerned, however, that the second settlement option--based on elimination of injury--could potentially result in anticompetitive agreements, a risk it believes outweighs the advantages gained by eliminating full-scale surrogate investigations. According to Justice, the principal concerns with the option as now presented are (1) the ability to conclude a settlement without proof of an unfair trade practice (i.e., dumping) and (2) conclusion of settlements based only on a preliminary finding of injury. Justice states that should this option be implemented, it should include the following safeguards: (1) the ability of the nonmarket economy respondent to request continuation of the proceedings and (2) publication of the agreement for public comment and a public interest determination by the Commerce Department.

We agree with the Department of Justice that the first settlement option may be more desirable from the standpoint of alleviating anticompetitive concerns. Nevertheless, we believe that, given the current difficulties in calculating dumping margins in nonmarket economy cases, it is appropriate to consider a settlement option that avoids the shortcomings of full-scale dumping proceedings while focusing on elimination of injury. We recognize, however, that it is important to incorporate sufficient safeguards to ensure that this option is not abused, and we have therefore included Justice's suggested additions in the option as now presented.

GLOSSARY (note a)

Administering Authority	Defined in Trade Agreements Act of 1979 as U.S. officer to whom responsibility for administering antidumping and countervailing duty laws is transferred by law (19 U.S.C. 1677). Prior to the Trade Reorganization Plan of January 1980, the Treasury Department performed this function; in January 1980 this function shifted to the Commerce Department.
Anti-Dumping Code	A code of conduct first negotiated under the auspices of GATT during the Kennedy Round of the multilateral trade negotiations and later revised during the Tokyo Round. The Code establishes both substantive and procedural standards for national antidumping proceedings. A committee of Code signators meet on a regular basis to monitor and discuss antidumping activities of the signatory countries. See Dumping.
Comparative advantage	A central concept in modern trade theory. A country or a region has a "comparative advantage" in the production of those goods it can produce relatively more efficiently than other goods. Modern trade theory says that, regardless of the general level of a country's productivity or labor costs relative to those of other countries, a country should produce for export those goods in which it has the greatest competitive advantage and import those goods in which it has the greatest competitive disadvantage. The country that has few economic strengths will find it advantageous to devote its productive energies to those lines in which its disadvantage is least marked, provided the opportunity to trade with other areas is open to it.
Compensation	A GATT principle which provides that a country taking an import restraining action affecting fair trade (e.g., raising a tariff above a previously agreed rate or setting import quotas) must consult with adversely affected countries to develop a package of compensatory tariff or other import facilitating concessions that will enable adversely affected countries to export compensatory volumes of other goods.

a/Terms taken principally from "The Language of Trade," U.S. International Communication Agency.

Contracting party	A country that has signed the GATT and thereby accepted specific obligations and benefits.
Council for Mutual Economic Assistance	Established in 1949, the Council's purpose is to promote economic coordination and integration "of the community of socialist states, and the cause of building * * * communism." Also known by the acronyms CMEA, CEMA, and COMECON. Full members are Bulgaria, Cuba, Czechoslovakia, GDR, Hungary, Mongolia, Poland, Romania, Vietnam, and the Soviet Union. Yugoslavia participates by special agreement. Afghanistan and the People's Democratic Republic of Yemen participate as official observers. Mozambique has announced its intent to join. Finland, Iraq, and Mexico have economic cooperation agreements with CMEA.
Countertrade	Generally, a transaction in which a seller (a Western exporter) provides a buyer (a Communist importing enterprise) with deliveries (e.g., technology, finished products, machinery, and equipment) and contractually agrees to purchase goods from the buyer equal to an agreed percent of the original sales contract value. Specific forms of countertrade include counterpurchases (counterdeliveries of goods unrelated to the Western export of plant or equipment) and compensation or "buyback" transactions (counterdeliveries of products produced by the Western-supplied technology, plant, or equipment).
Countervailing duties	Duties imposed on imports by the importing country to offset government subsidies in the exporting country. The United States has been legally empowered since 1897 to exact such duties. See Subsidies Code and Export Subsidies.
Discrimination	Inequality of trade treatment given to one or more exporting nations by an importing nation, as through preferential tariff rates for imports from particular countries or trade restrictions that apply to exports of certain countries but not to similar goods from other countries. For comparison, see Most-Favored-Nation Treatment.

Dumping	A term applied to certain unfair product pricing practices of foreign firms doing business in the United States. U.S. law says that dumping exists when a foreign firm (1) prices lower in the U.S. market than in its own domestic market, (2) prices lower in the U.S. market than in other export markets, or (3) sells at prices which do not permit recovery of normal costs over a representative time period. Sales under any of these circumstances are often termed sales at "less-than-fair-value" (LTFV). Domestic firms may petition for relief from these pricing practices but must demonstrate that the LTFV sales (1) are a cause of (or threaten) "material injury" or (2) are preventing establishment of a domestic industry in order to obtain relief in the form of anti-dumping duties which eliminate pricing differentials on imports. The amount of duty is determined by finding the difference between the (1) "United States price" (the foreign producer's selling price in the U.S. market, adjusted to an ex-factory level) and (2) "foreign market value" (the foreign producer's home market or other export market prices, adjusted to an ex-factory level). The difference between the U.S. price and foreign market value is called a dumping margin.
Escape clause	Refers to provisions of U.S. trade law designed to provide relief to domestic producers injured by increased import competition. Section 201 of the Trade Act of 1974 requires the ITC to investigate complaints filed by domestic industries or workers claiming that they are injured or threatened with injury by increasing imports. Section 203 of the Act provides that, if the ensuing investigation establishes that the complaint is valid, relief may be granted in the form of adjustment assistance (e.g., training, technical, or financial assistance) and temporary import restrictions which can take the form of tariffs, quotas, tariff-rate quotas, or orderly marketing agreements. The purpose of escape clause actions is to give hard-pressed industries time to adjust to the new competition with less hardship.
Export subsidies	Generally, direct government payments or other economic benefits given to domestic producers of goods that are sold in foreign markets. The GATT recognizes that "export subsidies" may distort trade and hinder the achievement of GATT objectives.

Free trade	A theoretical concept to describe international trade unhampered by government barriers, such as tariffs or nontariff measures. Completely free trade is not practiced today by any country. Those who favor trade liberalization usually prefer to use the term "freer trade," recognizing that there is little foreseeable possibility of arriving at pure "free trade."
General Agreement on Tariffs and Trade	A multilateral trade agreement aimed at expanding international trade as a means of raising world welfare. The designation GATT also refers to the organization headquartered at Geneva through which that Agreement is enforced. This organization provides a framework within which international negotiations are conducted to lower tariffs and other trade barriers and a consultative mechanism within which governments seek to minimize violations of those provisions.
Market access	Availability of a national market to exporting countries; i.e., reflecting a government's willingness to permit relatively unimpeded imports to compete with similar domestically produced goods.
Market disruption	As defined in section 406 of the Trade Act of 1974, a situation in which imports of an article from a Communist country, like or directly competitive with an article produced by a domestic industry, are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat thereof, to such domestic industry.
Most-Favored-Nation Treatment	A commitment that a country will extend to another country the lowest tariff rates it applies to any third country. All GATT contracting parties undertake to apply such treatment to one another under Article II of GATT. When a country agrees to cut tariffs on a particular product imported from one country, the tariff reduction automatically applies to imports of this product from any other country eligible for MFN treatment. This fundamental principle of nondiscriminatory treatment of imports appeared in numerous trade agreements prior to the establishment of GATT and has been a feature of U.S. trade policy since 1778. A country is under no obligation to extend MFN treatment to another country unless they are both contracting parties to GATT or unless MFN treatment is specified in an agreement between them. See also General Agreement on Tariffs and Trade and Trade Act of 1974.

Quantitative restrictions	Also called quotas; explicit limits, usually in volume, on the amount of a specified commodity that may be imported into a country, sometimes also indicating the amounts that may be imported from each supplying country. Compared to tariffs, the protection afforded by quotas tends to be more predictable, being less affected by changes in competitive factors. Quotas have also been used at times to favor preferred sources of supply. The GATT generally prohibits the use of quantitative restrictions, except in special cases, such as those cited in Article XX (which permits exceptions to protect public health, national gold stocks, goods of archeological or historic interest, and a few other special categories of goods) or in Article XXI (which permits exceptions in the interest of "national security") or for safeguards purposes when the appropriate procedures in Article XIX have been followed. See also Safeguards.
Safeguards	Temporary measures, which may take the form of higher tariffs, tariff quotas, quantitative restrictions, or voluntary restraint agreements designed to reduce the amount or speed of the internal economic adjustments required when domestic industries are faced with increased foreign competition and rapidly rising imports. Authority to take such actions in the United States--where they are referred to as "Escape Clause" actions--was renewed and clarified by the Trade Act of 1974. GATT Article XIX permits a country whose domestic industries or workers are adversely affected by increased imports to withdraw or modify concessions it had earlier granted or to impose new import restrictions if it can establish that a product is "being imported in such increased quantities * * * as to cause or threaten serious injury to domestic producers)" and to keep such restrictions in effect "for such time as may be necessary to prevent or remedy such injury." See also Escape Clause.
State trading nations	Countries, such as the Soviet Union, PRC, and the countries of Eastern Europe that rely heavily on government entities instead of private corporations to conduct their trade with other countries. Some of these countries (e.g., Czechoslovakia and Cuba) have long been contracting parties to GATT, whereas others (e.g., Poland, Hungary, Bulgaria, and Romania) participate in the GATT under special arrangements, each under different terms and conditions of accession that are generally designed to

	ensure steady expansion of the country's imports from other GATT countries despite the relative insignificance of tariffs in affecting import decisions in a State trading nation.
Subsidies Code	A code of conduct negotiated under the Tokyo Round of the multilateral trade negotiations to establish international rules governing subsidies practices.
Tokyo Round	The seventh round of trade negotiations held under GATT auspices since 1947. U.S. participation in this round was authorized in the Trade Act of 1974. Agreements reached during this round were implemented by the Trade Agreements Act of 1979.
Trade Act of 1974	Legislation signed into law on January 3, 1975, which granted the U.S. President broad new authority to enter into international agreements to reduce import barriers. The major purposes of the Act as stated in the legislation were to (1) stimulate the economic growth of the United States and to maintain and enlarge foreign markets for the products of U.S. agriculture, industry, mining, and commerce, (2) strengthen economic relations with other countries through the development of open and nondiscriminatory trading in the free world, (3)provide adequate procedures to safeguard American industry and American workers against unfair or injurious import competition, and (4) provide "adjustment assistance" to industries, workers, and communities injured or threatened by increased import competition. The Trade Act also granted the President authority to extend tariff preferences to certain imports from developing countries and to set conditions under which MFN treatment could be extended to imports from nonmarket economy countries that had not previously received MFN treatment from the United States. Trade negotiations in which the United States participated under the authority of this Act are called the Tokyo Round.
Trade Agreements Act of 1979	Legislation to implement the international codes negotiated during the Tokyo Round. See also Anti-Dumping Code and Subsidies Code.

CONFERENCE ON SECURITY AND COOPERATION IN EUROPE

FINAL ACT

General Provision on Commercial Exchanges

The Participating States,

Conscious of the growing role of international trade as one of the most important factors in economic growth and social progress,

Recognizing that trade represents an essential sector of their cooperation, and bearing in mind that the provisions contained in the above preamble apply in particular to this sector,

Considering that the volume and structure of trade among the participating States do not in all cases correspond to the possibilities created by the current level of their economic, scientific and technological development,

are resolved to promote, on the basis of the modalities of their economic cooperation, the expansion of their mutual trade in goods and services, and to ensure conditions favourable to such development;

recognize the beneficial effects which can result for the development of trade from the application of most favoured nation treatment;

will encourage the expansion of trade on as broad a multilateral basis as possible, thereby endeavouring to utilize the various economic and commercial possibilities;

recognize the importance of bilateral and multilateral intergovernmental and other agreements for the long-term development of trade;

note the importance of monetary and financial questions for the development of international trade, and will endeavour to deal with them with a view to contributing to the continuous expansion of trade;

will endeavour to reduce or progressively eliminate all kinds of obstacles tc the development of trade;

will foster a steady growth of trade while avoiding as far as possible abrupt fluctuations in their trade;

consider that their trade in various products should be conducted in such a way as not to cause or threaten to cause serious injury--and should the situations arise, market disruption--in domestic markets for these products and in particular to the detriment of domestic producers of like or directly competitive products; as regards to the concept of market disruption, it is understood that it should not be invoked in a way inconsistent with the relevant provisions of their international agreements; if they resort to safeguard measures, they will do so in conformity with their commitments in this field arising from international agreements to which they are parties and will take account of the interest of parties directly concerned;

will give due attention to measures for the promotion of trade and the diversification of its structure;

note that the growth and diversification of trade would contribute to widening the possibilities of choice of products;

consider it appropriate to create favourable conditions for the participation of firms, organizations, and enterprises in the development of trade.

NONMARKET ECONOMY COUNTRY MEMBERSHIP IN INTERNATIONAL ECONOMIC ORGANIZATIONS

Country	Member of		
	GATT	IMF (note a)	IBRD (note b)
Albania	No	No	No
Bulgaria	Observer	No	No
Czechoslovakia	Yes	No	No
GDR	No	No	No
Hungary	Yes	No	No
Poland	Yes	No	No
Romania	Yes	Yes	Yes
Soviet Union	No	No	No
PRC	No	Yes	Yes

a/International Monetary Fund
b/International Bank for Reconstruction and Development (World Bank)

STATUS OF U.S. COMMERCIAL RELATIONS WITH NONMARKET ECONOMY COUNTRIES (note a)

	Albania	Bulgaria	Czecho-slovakia	GDR	Hungary	Poland	Romania	Soviet Union	PRC
Diplomatic recognition	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
MFN tariff treatment	No	No	No	No	b/Yes	Yes	b/Yes	(c)	Yes
Eximbank facilities	No	No	No	No	b/Yes	Yes	b/Yes	(d)	e/Yes
Joint commercial commission (note f)	No	No	No	No	Yes	Yes	Yes	Yes	Yes
Joint trade council (private)	No	(g)	(g)	Yes	(g)	(g)	(g)	Yes	(h)
Trade Agreement	No	No	No	No	Yes	No	Yes	(c)	Yes
Long-term economic cooperation agreement (note i)	No	No	No	No	No	No	Yes	Yes	No
Foreign business representation offices permitted	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Foreign equity investment with local partner permitted	No	Yes	No	No	Yes	Yes	Yes	No	Yes

a/ Yugoslavia not included; considered by Commerce Department to be a market economy.
b/ Subject to terms of Trade Act of 1974.
c/ Trade Agreement extending MFN signed in Oct. 1972 but not in force because of lack of U.S. legislative authority for "unconditional" MFN treatment, as provided for in the Agreement; certain other provisions being implemented by both sides.
d/ Credits available from Oct. 1972 to Jan. 1975. Pursuant to Eximbank legislation and Title IV of the Trade Act of 1974, Bank facilities no longer available, but limited facilities could be restored if accord reached on certain provisions of the Trade Act.
e/ Eximbank facilities subject to terms of Trade Act of 1974.
f/ Government-to-government bodies established to discuss and negotiate outstanding trade issues.
g/ Under auspices of U.S. Chamber of Commerce.
h/ National Council for U.S.-China Trade is a private organization of U.S. firms; it is not a joint council since it has no PRC participants but it has a close working relationship with its PRC counterpart.
i/ Such agreements aimed at facilitating long-term business and economic cooperation.

Source: U.S. Department of Commerce

SUMMARY TABLES OF PRINCIPAL U.S. IMPORTS OF NONMARKET ECONOMY PRODUCTS 1980

(in millions of U.S. dollars and percent of U.S. imports from each country)

Imports from Albania:

Item	Value	Percent
Chrome ore	$6.81	64.0
Unground sage	3.70	34.0
Ground sage	0.08	0.7
Savory and rosemary	0.07	0.7
Natural crude drugs	0.05	0.5

Imports from Bulgaria:

Item	Value	Percent
Cigarette leaf	$14.52	63.0
Pecorino cheese	1.69	7.0
Typewriters	1.47	6.0
Leather footwear	1.03	5.0
Engine lathes	0.78	3.0

Imports from Czechoslovakia:

Item	Value	Percent
Leather welt workshoes	$7.04	10.7
Canned hams and shoulders	4.38	6.6
Hops	4.38	6.6
Jet type weaving machines	3.58	5.4
Men's leather welt shoes	3.00	4.6
Oilwell casing	2.89	4.4

Imports from GDR:

Item	Value	Percent
Offset printing press items	$3.97	9.0
Crude potassium chloride	3.70	8.4
Automobile tires	2.78	6.3
Mink fur	2.23	5.0
Pig/hog leather	1.68	3.8
Montan wax	1.60	3.6
Truck/bus tires	1.56	3.5
Cotton knit sportswear	1.29	2.9

Imports from Hungary:

Item	Value	Percent
Canned hams and shoulders	$21.81	20.3
Motor vehicle parts	14.61	13.6
Agricultural tractor parts	9.74	9.1
Women's leather footwear	8.68	8.1
Lightbulbs (household)	7.02	6.5

Imports from Poland:

Item	Value	Percent
Canned hams and shoulders	$133.82	32.0
Steel plate	18.14	4.0
Leather footwear	9.50	2.0
Coal	7.64	2.0
Woven vegetable fabric	7.48	2.0

Imports from PRC:

Item	Value	Percent
Gasoline	$81.81	7.7
Wool rugs	36.09	3.4
Naptha	30.95	2.9
Women's wool knitwear	23.85	2.3
Fireworks	23.18	2.2
Ammonium molybdate	22.51	2.1
Cotton shirts	21.35	2.0
Metal coins	20.63	1.9

Imports from Romania:

Item	Value	Percent
Naphthas from petroleum	$34.92	11.2
Railway car parts	18.81	6.0
Canned hams and shoulders	17.57	5.6
Women's leather footwear	13.79	4.4
Railway cars	11.62	3.7
Steel plate	11.30	3.6

Imports from Soviet Union:

Items	Value	Percent
Anhydrous ammonia	$94.80	20.9
Gold bullion	85.69	18.9
Palladium	54.56	12.0
Uranium flourides	34.60	7.6
Unwrought nickel	34.50	7.6
Metal coins	18.28	4.0
Palladium bars, plates, etc.	11.66	2.6

Source: Department of Commerce statistics

ANTIDUMPING DUTY COMPUTATION EXAMPLE

Quantity	Foreign market value (note a)	U.S. price	Margin	Margin (percent of U.S. price)	Total value (quantity x U.S. price)	Potential uncollectible dumping duty (PUDD) (quantity x margin)
10 each	$27	$18	$9	50	$180	$ 90
10 each	$27	$20	$7	35	200	70
					$380	$160

weighted average margin = $\frac{\text{PUDD}}{\text{total value}} = \frac{\$160}{\$380} = 42.10\%$

Thus on future shipments at the time of entry, customs will assess estimated antidumping duties of 42.10 percent (note b)

a/Foreign market value may be calculated over a period of time and may be a weighted average; time period selected is judgmental.

b/All orders reviewed annually. Review results are used to establish (1) actual antidumping duties due on shipments for the period under review and (2) a rate for estimated antidumping duties, to be paid on entry on all shipments until the next review is completed.

UNITED STATES DEPARTMENT OF COMMERCE
The Under Secretary for International Trade
Washington D C 20230

MAY 28 1981

Mr. Henry Eschwege
Director
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Eschwege:

Secretary Baldrige has asked me to respond to your letter enclosing, for our review and comment, your proposed report to the Congress concerning U.S. import laws affecting trade with nonmarket economies.

We believe the General Accounting Office has provided a thoughtful review of our import protection systems as they apply to nonmarket economies. We are in accord with recommendations to reduce the subjectivity and uncertainty inherent in the administration of our import laws.

We generally agree with the recommendations to the Secretary of Commerce that the Deputy Assistant Secretary for Import Administration be directed to 1)"develop and publish criteria to be used in determining whether a respondent's actual prices or costs could be used", and 2)"to amend Department regulations to more accurately reflect the criteria to be used in selecting surrogate producers and to publish the reasons for selecting surrogate producer(s) in individual dumping cases."

With respect to the report's recommendations to the Congress, we are now awaiting clearance from the Office of Management and Budget on comments we propose to submit to the Congress concerning S. 958, a bill to amend the Trade Act of 1974 to provide a special remedy for the artificial pricing of articles produced by nonmarket economy countries, which addresses many of the same issues. We shall send you a copy of our comments as soon as clearance is obtained.

With respect to the issue of the countervailing duty law as applied to nonmarket economies, the draft report makes an argument that, if the U.S. were to apply the rules of Article 15 of the GATT Subsidy/ Countervail Agreement to nonmarket economies without an injury test, it would encourage firms to launch new countervailing cases. The solutions suggested by the report are either not to apply Article 15 to nonmarket economies, or unilaterally to apply an injury test to them. To unilaterally apply an injury test in cases involving nonmarket nonsignatories to the Subsidies Code could well complicate

our trade relations with market-oriented signatory and nonsignatory countries. The anticompetitive effect of denying the injury test to nonmarket economy countries who have not signed the Subsidies Code should be weighed against the trade policy benefits of such an approach. This subject warrants further study.

In summary, we believe the General Accounting Office has done a commendable job in recommending ways to make our trade laws and implementing regulations more consistent and less discriminatory to importers while affording domestic industries the protection guaranteed them under the law.

As we are awaiting the appointment of the Deputy Assistant Secretary who would be responsible for the implementation of most of the laws described in your report, we request the opportunity to supplement these comments as soon as the position is filled.

Sincerely,

Lionel H. Olmer

U.S. Department of Justice

MAY 28 1981

Washington, D.C. 20530

Mr. William J. Anderson
Director
General Government Division
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Anderson:

This letter is in response to your request to the Attorney General for the comments of the Department of Justice (Department) on your draft report entitled "Trade With Nonmarket Economies: U.S. Import Laws and Regulations Could Be Improved."

At the outset, we would like to commend the General Accounting Office (GAO) for their thorough job in researching and presenting a good overview of the issues involved in U.S. trade with nonmarket economies. We are particularly impressed with the report's sensitivity to competitive concerns and to the effect that certain practices would have on American consumers. We do have the following comments to offer on some of the assertions and recommendations contained in the report.

1. Recommendations for Resolving Dumping Actions Against Nonmarket Economy Producers.

GAO recommends that the dumping laws be amended to provide that when the foreign market value of a nonmarket economy producers' product cannot be calculated on the basis of actual prices or costs, it should be calculated using either (1) the weighted average U.S. price of the lowest price free market producer selling in the United States ("U.S. market price approach"), or (2) the constructed value of the nonmarket economy producer's actual production factors as valued in an appropriate surrogate market economy ("simulated constructed value approach").

We agree with GAO that the current method of calculating dumping margins on imports from nonmarket economies leaves much to be desired. The methodologies used by the Commerce Department in calculating fair value for nonmarket economy producers have inherently arbitrary elements and make the result of dumping proceedings very unpredictable. This means that nonmarket economy producers cannot accurately determine the lowest price at which they can safely sell in the United States. As a result, many nonmarket economy producers will likely charge higher prices than necessary to sell in the United States or will refrain altogether from selling in the United States. Moreover, the uncertainties created by

current procedures may encourage the filing of frivolous petitions aimed at harassing the nonmarket economy exporter. In the end, American consumers must bear the burden of these arbitrary and unpredictable procedures.

GAO's recommendation that the "U.S. market price approach" be utilized where the use of actual prices or costs is impossible is a reasonable proposal. We agree that actual home market prices or costs should be used in calculating foreign market value whenever possible. Where actual home market prices or costs cannot be used, the U.S. market price approach would appear to give nonmarket economy producers credit for some comparative advantage, since the lowest price, rather than some higher price, free market producer is used to set the fair price level. This approach also has the advantage of eliminating much of the arbitrariness of the current procedure.

On the other hand, the U.S. market price approach contains some troubling aspects. This approach uses a surrogate methodology, as do the current procedures. While the U.S. market price method might permit the nonmarket economy producer to make a rough estimate of its allowable price range (an advantage over the currently used methods), in most cases, the nonmarket economy producer is unlikely to be able to determine on its own the weighted average price of the lowest price free market producer. Such price information is very sensitive and is not usually publicly available.[1/] This problem could arise even after a dumping margin was established, since the foreign market value could change radically depending on the pricing practices of the other firms in the market. Hence, while the U.S. market price approach is a good step toward dealing with the predictability problem faced by potential nonmarket economy exporters, it does not completely solve that problem.

The most serious problem with the U.S. market price approach[2/] is that it does not allow nonmarket economy producers to be the lowest price producer even if they have a clear comparative advantage. This is especially significant for nonmarket economy producers that are attempting

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1/ In fact, it may be extremely difficult for the Commerce Department to obtain the necessary price data from all producers selling in the United States, especially U.S. producers. The Commerce Department may need to obtain legislative authority to require U.S. producers to respond fully to Commerce Department questionnaires if the U.S. market price approach is to prove workable.

2/ We also suggest that the prices of all producers supplying a reasonable quantity of imports, rather than those supplying a reasonable "percentage" of U.S. apparent consumption as suggested by the report, should be examined during the lowest price market economy producer determination. In addition, the report should make clear that a producer would not otherwise be removed from consideration unless a preliminary or final dumping determination had been made against such producer.

to enter the U.S. market for the first time. New entrants generally must price below the existing market until they can develop consumer acceptance and build a reputation for quality and supply reliability. Forcing new entrants to price at the prevailing market level may effectively preclude them from entering the market at all, a result which is anticompetitive and is inconsistent with the goal of increasing trade with nonmarket economy countries.

GAO recognizes the possibility that a nonmarket economy producer could be the world's lowest cost producer and would, therefore, be entitled to sell at a price below the lowest priced free market producer. The report suggests that by allowing the nonmarket economy producer to opt for the simulated constructed value approach, this possibility would be adequately addressed. While we are concerned that, in actuality, the simulated constructed value approach may not always reveal a nonmarket economy producer's true comparative advantage, absent a better alternative, we support GAO's recommendation that this optional approach be retained. As GAO suggests, the Commerce Department should publish the criteria that will be used to select the appropriate surrogate market economy.

2. Application of Countervailing Duty Law to Nonmarket Economies.

GAO sets out two options for dealing with countervailing duty actions against nonmarket economy producers. The first option would rely upon actual subsidy quantification only. The second option would provide for the calculation of countervailing duties based upon simulation methods.

We are not sure that countervailing duty proceedings against nonmarket economy producers are at all appropriate, since the concept of subsidies may not have meaning in the nonmarket economy context. At most, countervailing duty proceedings against nonmarket economies should be allowed only if, as provided by the first option, actual subsidies can be identified and quantified by the petitioner in the original countervailing duty petition.

The calculation of a purchasing power equivalent is an interesting idea for purposes of subsidy--and indeed dumping--determinations. It should not be dismissed quite as readily as the report encourages, since it may still be possible to develop a defined methodology for making the currency equivalency calculation.

3. Recommendations for Section 406.

GAO recommends that some nonmarket economies be transitioned out of the section 406 coverage based on economic and/or political considerations.

The Department agrees with GAO's conclusion that the mere existence of section 406 can have a disruptive effect on trade from nonmarket economies. As pointed out, U.S. businessmen, before entering into commercial agreements with nonmarket economies, must include the threat that a section 406 action will disrupt imports from such nonmarket economies in their risk analysis. When the threat of a section 406 action is combined with the

possibility of antidumping and countervailing duty actions, not to mention section 201 proceedings, the multiple harassment potential may be great enough to discourage imports from nonmarket economies. Consequently, while the report's recommendation that some nonmarket economies be removed from section 406 coverage is a step in the right direction, we recommend that the overall need for section 406 be given close scrutiny.

4. Recommendations for Facilitating Settlements.

GAO concludes that the current settlement provisions for antidumping actions are not useful where nonmarket economies are involved. The report suggests two different approaches for settling antidumping actions against nonmarket economies. The first would allow price and/or quantitative restraint settlements to be entered into after a preliminary determination of injury by the International Trade Commission (ITC). The second would provide for price undertakings based on a price formula which would be entered into after affirmative preliminary determinations by both the ITC and the Commerce Department. 1/

We are somewhat troubled by the report's first proposal concerning settlements of antidumping investigations, i.e. that settlements of antidumping investigations be undertaken after the ITC's preliminary injury finding. Although we understand GAO's desire that surrogate fair value investigation procedures be avoided where possible, the settlement proposals in the report have an anticompetitive potential which outweighs the problems of full-scale surrogate investigations.

A procedure that allows for settlements after only preliminary injury findings by the ITC, without any showing of unfair practices, could have anticompetitive results. Settlements occurring before even a preliminary determination of sales below fair value would not be based on any notion of the "righting" of an unfair act. At such an early stage, it is difficult to see the basis for a negotiated settlement, since neither nonmarket economy exporters nor U.S. Government officials would have any measure of whether or not the subject pricing practices were justified.

Even GAO's suggested public interest review, a good concept in principle, would not prevent anticompetitive results in this situation. Potential commentators, such as the Justice Department, would not have information on the margin of dumping with which to weigh the anticompetitive aspects of the settlement agreement against the potential anticompetitive effects of an affirmative dumping determination. As a result, domestic entities might be encouraged to file frivolous antidumping petitions for the purpose of enlisting U.S. Government help in eliminating, at little cost, threatened competition from imports. Anticompetitive agreements could be entered into under the guise of antidumping investigation settlements.

This settlement proposal appears to be based on a notion that the United States should move away from the concept of attempting to determine whether imports from nonmarket economies are unfair, to a concept that injurious imports alone are sufficient to warrant relief. Such a notion is inconsistent with the report's earlier recommendations concerning revised antidumping procedures. Moreover, this proposed settlement

1/The order of these approaches has been reversed in the report (see p. 51).

scheme is not sufficiently grounded on an appropriate injury rationale. The settlement proposal contemplates that settlement consideration would begin after the ITC's preliminary injury determination, but the standard used by the ITC at that stage is only whether there is "a reasonable indication" of material injury--a very weak test which in practice all but the most baseless petitions can usually pass. A settlement agreement entered into on the basis of this determination alone would not be in the public interest, since there would be a good chance that the exported products would ultimately be found not to be actually causing material injury to a domestic industry.

We are also uncomfortable with GAO's suggestion that this settlement option should include quantitative restraint agreements. As a general matter, we believe that quantitative restrictions are likely to have a more distorting effect on competition than do tariff increases. Price undertakings, whose effects are more akin to the imposition of antidumping duties than are those of quotas, are fully adequate to eliminate the basis of dumping complaints. Where quantitative restraints are imposed, as in section 201 cases, their rationale usually is to allow the domestic industry an opportunity to adjust to import competition, and the restraints are accordingly limited in duration. Quantitative restraints in an antidumping context would be neither supported by an adjustment rationale nor necessarily limited in duration. Therefore, we think it preferable that antidumping investigation settlements be based on price undertakings rather than on quantitative restraint agreements.

If this settlement proposal were to be implemented, we believe four additional requirements would be essential. First, the nonmarket economy producer should be allowed to require continuation of the full investigation. If either the Commerce Department or ITC final determination is negative, the settlement agreement would become void. Second, as suggested by the report, the proposed settlement agreement should be published for public comment. Third, the Commerce Department should be required to make a public interest determination and to take into account competitive concerns in that determination. Fourth, if quantitative restraints are used in settlements, they should be limited in duration.

The report's second settlement approach holds more potential. GAO suggests that a price formula be developed based on the estimated foreign market value derived from the appropriate surrogate technique. While the derivation of an appropriate price formula might be arbitrary, we could find this approach attractive if an opportunity is provided for public comment and if the nonmarket producer is allowed to require a continuation of the dumping proceeding.

Finally, GAO's recommendation that the consultation provision of section 406 be used more to resolve perceived trade problems with nonmarket economies is disturbing if GAO contemplates that antidumping and countervailing duty actions be resolved in this context. Consultations under section 406 can only be undertaken where there is evidence of market disruption, a standard much stricter than that for antidumping or countervailing duty injury determinations. Therefore, U.S. Government attempts to resolve antidumping and countervailing duty actions through section 406 consultations would be inappropriate.

We appreciate the opportunity to comment on the draft report and hope that our views concerning several of the issues will be of value. Should you desire to discuss any of our comments in greater detail, please feel free to contact us.

Sincerely,

for Kevin D. Rooney
Assistant Attorney General
for Administration

DEPARTMENT OF STATE
Comptroller
Washington, D.C. 20520

27 MAY 1981

Mr. Frank C. Conahan
Director
International Division
U.S. General Accounting Office
Washington, D.C.

Dear Frank:

I am replying to your letter of April 22, 1981, which forwarded copies of the draft report: "Trade With Nonmarket Economies: U.S. Import Laws And Regulations Could Be Improved".

The enclosed comments on this report were prepared by the Acting Deputy Assistant Secretary for Trade and Commercial Affairs in the Bureau of Economic and Business Affairs.

We appreciate having had the opportunity to review and comment on the draft report. If I may be of further assistance, I trust you will let me know.

Sincerely,

Roger

Roger B. Feldman

Enclosure:

As Stated.

GAO DRAFT REPORT: "Trade with Nonmarket Economies;U.S. Import Laws and Regulations Could Be Improved"

The Department of State has reviewed the draft GAO report and supports many of its conclusions. Our major comments are below-- more specific comments are attached. 1/

-- The basic premises (listed on page 15) which should (now p. 11) be used to consider unfair trade practice legislation as it relates to nonmarket economy countries should include economic factors such as the effect on inflation and on retailers' and consumers' interests, and should allow for the possiblity that some nonmarket economy countries will have a comparative advantage in the production of some goods.

-- The discussion of trade with nonmarket economies (especially on pages 3-4) places great emphasis on the political aspects of such trade. We acknowledge that trade cannot be isolated from its political context. While expansion or curtailment of such trade may occur for political or security reasons, we believe that sound economic reasons underpin the trade that occurs.

-- The report inaccurately states that all countervailing duty investigations of duty free goods will include a determination of injury. The Trade Act of 1974, which extended the countervailing duty law to cover duty free goods states: "In the case of any imported article or merchandise which is free of duty, duties may be imposed under this section only if there is an affirmative determination by the Commission under subsection (b)(1): except that such a determination shall not be required unless a determination of injury is required by the international obligations of the United States." (emphasis added) While this qualification is arguably ambiguous, i.e. what constitutes an "international obligation" for this purpose, it should be noted that countries which are not contracting parties to the GATT or to which we do not extend MFN treatment in this respect e.g. Mexico, would be unlikely receive an injury test in countervailing duty investigations of their duty free exports.

1/Attachment not included, but detailed comments are incorporated in the report where appropriate.

-- We agree with the report's conclusion that the denial of an injury test in countervailing duty investigations, with respect to countries which have not signed the Code, could have grave anti-competitive effects and could harm our trade relations with many of the countries involved. The selective extension of an injury test does not appear to have been a useful inducement to countries to sign the Subsidies Code or to assume equivalent obligations.

Adherence to the Code is a complicated issue involving many political and economic factors. The ability of nonmarket economy countries to assume the obligations of the Code, and thus be entitled to an injury test, is questionable. The issue is further complicated by the U.S. policy of requiring LDC signatories to the Code to submit a commitment disciplining their use of export subsidies as a condition for our application of the Code (and thus the injury test) to that country. Some nonmarket economy countries may wish to accede to the Code as LDC signatories. However, the United States has not faced the issue of accession by a nonmarket LDC and therefore has never been called upon to determine what sort of discipline we would expect.

-- Basically, we support the report's conclusion that real prices should be used whenever possible in antidumping investigations. However, the extent to which actual prices can be used in an economy lacking thorough decentralization of pricing authority should not be exaggerated. The alternative methods proposed for calculating foreign market value, the U.S. market price approach and the simulated constructed value approach, have shortcomings as recognized in the report.

In particular, the U.S. market price approach which takes the lowest import price into the US as the standard, could have the effect of pricing nonmarket economy country exports out of the U.S. market. This is possible because of the adjustments used to arrive at foreign market value.

For example; if widgets from Country A enter the US at $7, and from Country B at $7.50, Country A would be chosen as as having the "lowest U.S. market price" for purposes of calculating the dumping margin of a nonmarket economy country whose widgets are priced lower than $7.00. However, the adjustments, including shipping, which are then made on the Country A price might result in a calculation of the Country A ex-factory price at $6.00. These same adjustments,especially those for shipping, might have led to a Country B ex-factory price of $5.50. Nevertheless the nonmarket producer is assessed a duty based on

the Country A price, since Country A has the lowest US market price. In this fashion, differences of distance and other factors can result in an inappropriate choice of the lowest US market price. The only way to eliminate such distortions would be to calculate the ex-factory price, with adjustments for volume and type of production, for a wide variety of exporters to the United States -- and what started as a simple procedure has become a complicated one.

Furthermore the U.S. market price approach allows for little possibility that the nonmarket economy might have a comparative advantage in the production of certain goods.Given the low prices of labor and some other inputs in certain nonmarket economies this possiblity should be taken into account.

-- Finally, we support the conclusion that consultations should be held to resolve unfair trade practices and market disruption cases, but only after a preliminary determination has been made that domestic producers are being injured. To do otherwise could make petitioning for consultations a means of restricting competition. We would note that the GAO recommendation for petitioning for such consultations could essentially be effected under the complaint provisions of Section 301 of the Trade Act of 1974 which already provides for consultations by the Special Trade Representative.

-- We note that a bill (S.958) has recently been introduced in the Congress concerning many of the same issues addressed in the draft GAO report. That bill and consequently these general issues, are still under consideration by the Department.

William H. Edgar May 22, 1981

William H. Edgar
Acting Deputy Assistant Secretary of State
For Trade and Commercial Affairs

CHAIRMAN

UNITED STATES INTERNATIONAL TRADE COMMISSION

WASHINGTON, D.C. 20436

May 15, 1981

Mr. Frank C. Conahan
Director, International Division
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Conahan:

Thank you for allowing the U.S. International Trade Commission to comment on your proposed report to the Congress concerning trade with nonmarket economies. We have reviewed the draft report and wish to comment on three general areas.

First, with respect to investigations under section 406 of the Trade Act of 1974, we agree that there have been few cases filed. We disgreee, however, that this paucity of cases necessarily demonstrates the ineffectiveness or irrelevance of the statute (p.48). It is very possible that the infrequency of complaints made under section 406 indicates the success and not the failure of the legislation. The very existence of section 406 may have discouraged potentially disruptive imports from nonmarket economies or it may have directed trade into nondisruptive areas. Congress presumably intended these effects when it enacted section 406. In any event, the amendments to section 406 that you propose, especially with respect to changing the definition of nonmarket-economy countries, are policy matters that are outside of the Commission's authority and on which the Commission takes no position. (now p. 36)

Second, your proposal (p.75) that the Commission review settlements of dumping cases involving nonmarket economy countries to determine whether any given settlement would relieve injury to the domestic industry is comparable to investigations currently within the Commission's jurisdiction and hence should pose no particular problem. It should be understood, nevertheless, that our acknowledgement of our capability to conduct this type of review does not constitute our taking any position on your proposal itself. (now p. 51)

Finally, we wish to comment on your recommendation (p.79) that the substantive reporting requirements of section 411 be added to the Commission's quarterly reports on East-West trade under section 410. We believe it to be inappropriate for the Commission, an objective, fact-finding body, to make "recommendations for the promotion of east-west trade in the national interest of the United States." Such recommendations necessarily involve political, economic, and even military issues that are outside of the Commission's jurisdiction. If section 411 is to be eliminated, we suggest that only those elements that are based on factual analysis be reassigned to the Commission. (now p.43)

Sincerely,

Bill Alberger
Chairman

OFFICE OF THE UNITED STATES
TRADE REPRESENTATIVE
EXECUTIVE OFFICE OF THE PRESIDENT
WASHINGTON
20506

Mr. Frank C. Canahan
Director, International Division
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Canahan:

This is in response to your letter of April 22 requesting the comments of this office on the GAO proposed report concerning import laws affecting trade with nonmarket economies.

We welcome the proposed report as a valuable first step in attempting to accommodate the difficult issue of applying U.S. trade laws to nonmarket economy countries in a manner which is both equitable and consistent with U.S. trade policy. As such, the report is useful in identifying major problems arising from current operations of certain U.S. trade laws as they apply to such countries. In addition, the report suggests potential solutions to such problems. However, we believe that some of the proposed solutions require considerable additional study before consideration is given to their implementation.

The attached are specific comments we would like to make with respect to specific recommendations and suggestions contained in the report.

Very truly yours,

John E. Ray
Assistant United States
Trade Representative
for Bilateral Affairs

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Enclosure

GAO Recommendation on Section 406

> "GAO believes that section 406 should be modified to allow at least some Communist countries to be removed from its provisions, as determined by the President in consultation with Congress."

We agree with this recommendation on section 406. We also s share GAO's view that in the six years since its enactment section 406 has been "an irritant in U.S. relations with at least some Communist [sic] countries." Many nonmarket economy countries are reluctant to enter into long-term contracts because they fear future actions under section 406.

The fears of "flooding" by imports from nonmarket economy countries which were the motivation behind section 406 have not materialized. Similarly the United States has not become overly dependent on nonmarket economy countries for vital raw materials and minerals, and there have not been any instances of market disruption in this sector.

Only a limited number of petitions have been filed with the U.S. International Trade Commission under section 406. To date, there have been five petitions for relief from market disruption and only two have resulted in an affirmative injury determination. In the first instance, regarding clothespins from the PRC, the President declined to grant relief pending the outcome of an ITC-initiated investigation under section 201 of the effect of imports of clothespins from all sources. In the second instance, regarding anhydrous ammonia from the USSR, the President decided that the provision of relief was not in the national economic interest. In those section 406 cases involving countries with most-favored-nation status at the time (i.e., Poland and Romania), no market disruption was found.

We assume that the proposal to modify section 406 to grant discretionary power to remove certain nonmarket economy countries from section 406 would also include authority to bring them back under section 406 coverage. Further study of the exact economic criteria to remove countries from coverage needs to be done. One relevant factor that should be included is the extent to which a nonmarket economy country's exports have caused market disruption in the past.

GAO Recommmendation on Consultations

> "To ensure consultations to resolve section 406 market disruption cases can be used when appropriate, we recommend that the United States Trade Representative devise and publish criteria to be used in accepting petitions to engage in consultations."

The above recommendation is based on section 406(d) which authorizes the President to accept petitions requesting the initiation of consultations provided for in bilateral agreements entered into under section 405. The Senate Finance Committee report language quoted by the report refers to the version of section 406(d) which passed the Senate in which this authority was given to the Special Trade Representative. However, in conference this provision was amended to delete the reference to STR and to insert "the President" (see Conf. Rept. 93-1644, p. 48). Thus contrary to GAO recommendation, section 406 does not give the authority to accept such petitions to the Office of the United States Trade Representative nor has such authority been delegated.

The U.S. attaches great importance to the use of the consultative mechanism in our bilateral trade agreements with nonmarket economy countries. However, we do not believe that a formal petitioning process is necessary to ensure use of this consultative mechanism. Under our bilateral agreements with Romania, Hungary and the PRC, the United States Government has the right to prompt consultations whenever actual or prospective imports cause or threaten to cause market disruption. Furthermore, the United States Government can, and does, informally consult with these foreign governments on a wide

variety of trade issues. In addition, interested parties may take advantage of other provisions of U.S. trade laws, i.e., section 301 of the Trade Act of 1974, as amended, to ensure that the consultative mechanism is used in cases in which it is believed that a provision of our bilateral agreement has been breached. Under these circumstances, the establishment of additional detailed procedure to request initiation of consultations is, in our view, an unnecessary and cumbersome administrative process.

The report also suggests that "there would be merit in allowing domestic entities to petition for consultation with all countries included under sectin 406". As noted above, we disagree with the need for a formalized petitioning process to ensure use of such consultations. The United States Government responds to concerns of the private sector by requesting consultations with foreign governments whenever appropriate and will continue to do so.

GAO Recommendations on Trade Monitoring

> "delete the section 411 report requirement from Title IV of the Trade Act of 1974 and add its substantive reporting requirement to section 410 of that act."

We disagree with GAO's recommendation. We believe that the present system of one report covering trade data and a report on East-West trade policy developments should be continued. Two sections of the Trade Act of 1974 reflect Congressional interest in receiving periodic reports on East-West trade. Section 410 of the Trade Act instructs the U.S. International Trade Commission to monitor imports from and exports to nonmarket economies and section 411 requires quarterly reports from the East-West Foreign Trade Board on the status of trade between the United States and nonmarket economy countries.

Reorganization Plan No. 3 of 1979 (44 F.R. 69273, 19 U.S.C. 2171 Note) abolished the East-West Foreign Trade Board and transferred to the President the functions of the Board under Section 411(c). USTR initiated preparation of the Section 411 report in 1980. The East-West Trade Report was recently completed by USTR and covers calendar year 1980 activities. The section 411 report was approved by the interagency Trade Policy Committee system and has been sent to the White House for the President's signature. The report includes, pursuant to Section 411(c), a discussion of the status of bilateral agreements, the activities of joint trade commissions and councils created pursuant to such agreements, trade complaints involving products of nonmarket economy countries, and trade promotion activities of

the Department of Commerce during 1980. (In the past, the first quarterly report has provided a review of the previous year's developments in East-West trade, as well as reporting on quarterly developments.) This report also contains a policy overview of U.S. trade relations with nonmarket economy countries.

During the hiatus when the East-West Foreign Trade Board became defunct and the resources of the Office fo the U.S. Trade Representative were directed towards completion of the multilateral trade negotiations, the U.S. International Trade Commission expanded the scope of the section 410 report. During this period, the ITC report has included, where appropriate, discussions on the status of bilateral trade negotiations, activities of the trade commissions, and any outstanding trade dispute cases under adjudication by the United States Government.

In the section 411 report, discussion of trade data, which was fully covered in the USITC report for 1980, was kept to a minimum. USTR will hold further discussions with the ITC regarding eliminatioin of any possible duplication in the two reports. Similarly, the East-West Trade Report refers to the Export Administration Annual Report FY 1980, published by the U.S. Department of Commerce.

The section 411 report is designed to inform the Congress of the Administration's East-West trade policy, as well as trade developments. This report is prepared by USTR, which is the Administration's policy coordinating agency and is cleared through the Interagency Trade Policy Committee. On the other

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hand, the USITC is an independent investigatory body and, as its report is not cleared by other agencies, it is not in a position to present to the Congress the Administration's policy on East-West trade.

GAO Comments on U.S. Countervailing Duty Law

While making no specific recommendation regarding the U.S. countervailing duty law, the GAO report (pp. 47, 48) suggests that the U.S. enter into bilateral agreements with nonmarket economy countries which have not signed the Subsidies Code, pursuant to which these countries would agree to adhere to the Code's principles to the extent possible. The U.S. would, in turn, provide these countries with the benefit of an injury test in our domestic countervailing duty law. Such action would, in our opinion, require an amendment to section 107(b) of the Tariff Act of 1930, as amended which defines the term "country under the Agreement" for purposes of applying an injury test since the obligations to be assumed by the nonmarket economy countries would not be "substantially equivalent to obligations under the Agreement."

There are a number of drawbacks to this suggestion which the report fails to note. First, the action would establish a group of countries, the nonmarket economy countries, which would be given the benefit of an injury test under domestic U.S. law under less rigorous requirements than those applied to other countries. This would provide an advantage to non-market economies which the U.S. does not extend to more traditional trading partners. Second, not only is such action questionable on policy grounds, it would also likely constitute a violation of the MFN principle of Article I of the GATT at least with respect to those nonmarket economy countries which are GATT signatories.